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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 40

UNIVERSAL CAMERA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 157-166)[1] is reported at 179 F. 2d 749. The findings of fact,

[1] The record filed by petitioner with this Court, herein referred to as "R," is in four sections, designated Part "A" (Petition for Enforcement); Part "B" (Appendix to the Board's brief below); Part "C" (Appendix to the Company's brief below); and Part "D" (proceedings in the court below). Occasional references to the original transcript of testimony taken at the hearing before the Board, which was certified by the Board to the court below and lodged with the Clerk of this Court, are designated (Tr.). Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's decision; succeeding references are to the supporting evidence.

conclusions of law and order of the Board are reported at 79 NLRB 379 (R. 11-35).

JURISDICTION

The decision of the court below was rendered on January 10, 1950, and its decree enforcing the Board's order was entered on January 25, 1950 (R. 157, 167-169). The petition for a writ of certiorari was granted on May 29, 1950 (339 U. S. 962). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the 1947 amendments to the National Labor Relations Act broadened the scope of court review of Board findings and orders.

2. Whether the fact that the Board has reversed findings of a trial examiner of itself detracts from the substantiality of the evidence which supports the Board's findings.

3. Whether the Board's findings are supported by substantial evidence on the record considered as a whole.

4. Whether the exclusion of supervisors from the definition of "employee" in the amended Act operates retroactively so as to preclude the Board from ordering the reinstatement with back pay of a supervisor who, prior to the enactment of the amended Act, was discriminatorily discharged for testifying in a Board proceeding.

STATUTES INVOLVED

The statutory provisions principally involved are the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151, *et seq.*), Sections 2 (3), 8 (4) and 10 (e); the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, et seq.), Sections 2 (3), 8 (a) (4), 10 (c) and (e); the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Sec. 1001, *et seq.*), Sections 5(c), 7 (b), 8, and 11; and the General Savings Statute (61 Stat. 635, 1 U. S. C. (Supp. III), § 109). These provisions are, in the main, set forth in the Appendix to petitioner's brief, pp. 54-65.

STATEMENT

Upon a charge duly filed by Imre Chairman, an individual, the Board on October 2, 1946, issued its complaint alleging that Universal Camera Corporation, herein called the Company or petitioner, had on or about January 25, 1944, discharged Chairman because he gave testimony under the Act (R. 21; 94-95). In its answer the Company denied the allegation and averred that Chairman had been discharged for "gross insubordination" (R. 21-22; Bd. Exh. 1G). A hearing upon the complaint was held before a trial examiner of the Board from October 28 through November 8, 1946 (R. 22). On February 18, 1947, the examiner issued his intermediate report recommending dismissal of the complaint (R. 21-35). On August 31, 1948, the Board issued its findings of fact,

conclusions of law and order, reversing the examiner's recommendation (R. 11-19). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:

I. The Board's Findings of Fact

A. *Events preceding the representation hearing of November 30, 1943*

In August, 1943, the Company employed Imre Chairman as an assistant engineer to supervise the maintenance mechanics on the 4 p.m. to midnight shift (R. 24; 40). For some time prior thereto the maintenance staff had engaged in organizational activities for the purpose of obtaining representation by Local No. 3, International Brotherhood of Electrical Workers, A.F.L., hereinafter called the Union (R. 24; 39-42, 80-81).[2] Chairman immediately interested himself in the organizational efforts of the maintenance employees;[3] he attended Union meetings and assisted them in initiating the representation proceeding (R. 24, 31-32; 41-42).

The Union filed a petition with the Board for an election and certification of representatives and a

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[2] The Company's production employees were represented by a C.I.O. union which had a contract with the Company. However, membership and representation had been denied by this union to the maintenance employees (R. 25; 53).

[3] Chairman advised his immediate supervisor, Plant Engineer Politzer (R. 41) that the men had requested him to join the Union (Tr. 113). Politzer replied that "as an engineer if I were in your place I would not join" (*ibid.*). Chairman for this reason did not join and so advised the men (*ibid.*).

hearing was held, commencing November 26, 1943 (R. 24; 42).[4] The contention of the petitioning Union, that the maintenance mechanics and certain associated non-production employees constituted an appropriate unit, was opposed by the Company and the CIO union (R. 25; 44-45, 53-54). The Company and the CIO union both sought dismissal of the petition, contending that the existing contract covered the employees in the proposed unit, and further, that the proposed unit was inappropriate (R. 25).

B. *Chairman testifies at the representation proceeding and the Company seeks ground for his dismissal*

Chairman, who had helped the maintenance employees prior to the representation proceeding, also attended the hearing at their request (R. 24; 42). He was present on November 26 but did not testify, the proceedings being adjourned to November 30, (R. 25; 42-43).[5] After Chairman attended the November 26 session of the hearing, Plant Engineer Politzer, his immediate supervisor, repeatedly warned him that it would not do him "any good" to testify (R. 25; 41, 43). On November 27, the day following the first session of the hearing, Politzer advised Chairman not to testify at the

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[4] *Universal Camera Corporation*, 54 NLRB 1037.

[5] While waiting to be called as a witness on the 26th Chairman sat with the petitioning employees and apart from the Company officials (R. 42).

coming session to be held on November 30 because "the Company heard [he] was down to testify and unless [he] want[ed] to be in bad graces with the Company [he] should not go down" (*ibid.*). The same day, to add further weight to his warning, Politzer instructed Harry Goldson, an engineer with status similar to that of Chairman, to caution Chairman against testifying (R. 25; 56). Pursuant to this instruction Goldson informed Chairman that he "should watch [his] step" because "they [the Company] know [he is] with the men" and if he testified at the hearing "it would not help [him] with the company" (R. 25; 43-44, 56).

In spite of these warnings Chairman appeared at the November 30 session and, in support of the petitioning Union, took the stand both during the morning session and the early part of the afternoon, testifying at length (R. 25; 44, 91). The Company, opposing the petition, called Shapiro, its vice president, Kende, its chief engineer, and Politzer, all of whom gave testimony substantially different from Chairman's (R. 25; 44-45, 53-54, 65, 80).[6]

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[6] In its decision in the representation proceeding the Board in effect rejected the testimony of the Company officials and accepted that of Chairman and the employees as the more credible (54 NLRB 1037, 1038-1040). The Board directed an election among the employees in the proposed unit which resulted in the certification of the petitioning Union which thereafter entered into a contract with the Company (R. 24; 40).

The same day, after testifying, Chairman duly reported at the plant for work on his regular shift (R. 25; 40, 45). At about 7 p.m. that day, while leaving the plant for dinner, he met Chief Engineer Kende, who was entering the building (R. 25; 45, 64). Kende, indignant over Chairman's testimony, heatedly charged Chairman with having perjured himself at the hearing (R. 12, 25-26; 45, 58, 64). Chairman replied "if you call me a liar you are a liar" (*ibid.*).

Kende's animosity toward Chairman for testifying as he had was admittedly intense (R. 12-13; Tr. 532, 1010-1011).[7] Although Kende had not heard Chairman testify (R. 26, n. 5; Tr. 1205-1206), he felt that the latter "was deliberately lying, not in one instance but in many instances, all afternoon" (R. 26; 65). In Kende's mind, after Chairman testified, "there was definite doubt regarding his suitability for a supervisory position of that nature. I intended to investigate that doubt, and if possible to get rid of that doubt" (*ibid.*). For the purpose of finding an excuse to discharge Chairman, Kende, the following morning, called Politzer and Personnel Manager Weintraub (R. 26; 75) to his office (R. 12, 26; 65-66, 78,

[7] Counsel for the Company stated at the hearing that "There was a difference between the evidence of Mr. Kende and Mr. Chairman, and Mr. Kende was incensed about it" (Tr. 532). Politzer testified that "Kende was very angry with him [Chairman] for having to fight him" (Tr. 1010-1011).

81). Kende first inquired about Chairman's work. Despite Politzer's assurance that Chairman's work was satisfactory (R. 26; 65, 78, 81), Kende instructed Politzer to keep watch on him (R. 26; 66, Tr. 565-566). Kende then examined Chairman's employment application. Noting a personal reference from the editor of a foreign language newspaper, Kende inferred that Chairman must be a Communist (R. 26; 66, 78, 82). Kende was unwilling to act on this belief without further proof, however,[8] and the conference adjourned. Following the conference Politzer undertook to investigate whether Chairman was a Communist, and he subsequently reported to Kende that Chairman was not a member of the Communist Party (R. 26-27; 82).[9] As the Board found (R. 12-13), since neither ground for discharge was feasible, the Company did not discharge Chairman at that time.

After the conference, Politzer told Chairman that Kende was very angry and that he had better apologize, otherwise the Company officials would try to find some excuse to dismiss him (R. 27; 46, 58, 87). Chairman's credited version of Politzer's statements, which the latter admitted he may have made, reads (R. 27; 46-47, 87):

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[8] Kende testified (Tr. 566-567), "I realized that my belief that he was a Communist was still a belief."

[9] As a result of this conference Weintraub also required Chairman to submit further evidence of his qualifications as an engineer (Tr. 1227-1229).

> They are scanning my application, whether I did not make any statement, because Kende wants to have something criminal on me, and he says I am sub[versive] * * * on account of my going down to give testimony, they are after my scalp.

Politzer also told Goldson about the conference, adding that he thought the Company would find some way to discharge Chairman, and asked Goldson to warn him. Goldson did so (R. 27; 47, 56-57, 87, 88).[10]

C. *The altercation between Weintraub and Chairman on December 30, 1943*

On the night of December 30, 1943, Chairman stationed Kollisch, a maintenance mechanic, at the mechanics' shop for emergency call (R. 27; 37, 47). The plant was engaged in war production at the time, and Personnel Manager Weintraub, patrolling the various departments to make sure that there was no slackening of work because of the approaching New Year's holiday, came upon Kollisch seemingly loafing (R. 27; 75-76, 37). Weintraub brought Kollisch to Chairman and demanded that Chairman "Fire him. Send him home" (R. 27-28; 38-39, 48, 76). Chairman ex-

[10] Goldson further suggested to Chairman that if there was anything in his record which could not bear scrutiny he should resign because "Kende has all the reports in, and your application blank, and they want to see if they can get rid of you" (R. 47, 57-58). Chairman, however, refused to apologize or to resign (R. 58).

plained that he had directed Kollisch to stand by for emergency duty, but Weintraub insisted (R. 28; 39, 48). Chairman then told Weintraub that he needed the services of Kollisch that night, and that since his orders came from Politzer, the matter could be taken up with Politzer the next day and Kollisch discharged if necessary (R. 38; 48, 60). Weintraub retorted, "I am the boss," "I have such powers from the War Department that if I want to" "I can slap a man," "I can kill a man if I want to" (R. 28; 48, 60). Chairman answered, "If you are drunk, please go home and sleep it off" (*ibid.*). Weintraub then ordered Chairman to leave the plant, but Chairman would not do so (R. 28; 48, 76, 60). Unable to reach a guard by telephone, Weintraub rushed out of the office, returning with a uniformed guard (R. 28; 76, 48-49, 60-61). Zicarelli, shop steward for the Union representing the maintenance mechanics, intervened (R. 28; 49, 59, 61, 76-77). Remonstrating with Chairman and Weintraub, he got both men to agree to shake hands and forget the incident (R. 28; 49, 76-77, 61-63). Weintraub and the guard then left and Chairman finished his shift without further incident (R. 28-29; 49, 62-63, 64).

D. *The discharge of Chairman*

Chairman reported to work as usual the next day (R. 13-14, 29; 50, 79, 82). He told Politzer of the occurrence of the night before, including a

statement that Weintraub had been drunk, and asked whether Weintraub had authority to give him orders (R. 29; 50, 82, 83). Politzer did not reprimand or discipline Chairman but assured him, instead, that Weintraub was not his boss and that Weintraub had acted "out of order" in seeking to assert authority over Chairman (R. 13, 29; 50-51, 83, 87). Politzer added that he would see to it that Weintraub kept his promise to forget the matter (R. 29; 50). On the same day, Zicarelli, who had mediated between Weintraub and Chairman the night before, spoke to Weintraub and got his assurance that the incident was "forgotten" (R. 14; 63). Chairman continued regularly at work (R. 13-14, 31; 79).

About January 11 or 12, 1944, Politzer reported to Chairman that "Weintraub is acting funny, * * * he wants to bring up this question again," and asked Chairman whether he would consider resigning (R. 31; 51). Chairman refused, saying, "I know that they want to do something because I helped the men and testified for them, that then, I never quit under fire and I will see it through to the end" (*ibid.*).

About two weeks later, on January 24, Weintraub told Politzer he wanted Chairman out of the plant (R. 31; 77, 84, 88). Politzer challenged Weintraub's authority to order the dismissal and the two sought out Politzer's superior, Kende,

telling him of their disagreement and the circumstances which had given rise to it (R. 31; 77-78, 84).

Politzer voiced his opposition to the discharge, but Kende did not question Chairman himself or in any manner investigate the incident (R. 13, 31; 67-69, 77-78, 84-85). He summarily told Politzer to abide by Weintraub's decision (*ibid.*). Politzer thereupon filled out a slip terminating Chairman's employment as of the next day, January 25, for "misconduct" (R. 31; 78, 85, 99-100).

On the following day, January 25, Chairman was stopped by a guard when about to enter the plant and was sent to Weintraub's office (R. 31; 51). Weintraub told Chairman that he had been discharged for misconduct and had a guard escort him to Politzer's office to get his personal possessions (R. 31; 52, 88-89). There, Politzer assured Chairman that he had been satisfied with his work and had not wanted to discharge him (R. 31; 52, 89). On January 28, 1944, a charge was filed with the Board at Chairman's behest alleging that his discharge violated Section 8 (1) and (4) of the Act (R. 23; 153-154, cf. Tr. 304, 323).

II. The Board's Conclusions of Law

The Board, one member dissenting (R. 18-19), found that in violation of Section 8 (4) of the original National Labor Relations Act, which forbade an employer "to discharge or otherwise discriminate against an employee because he has filed

charges or given testimony under this Act," the Company discharged Chairman because of the adverse testimony he gave at the Board representation hearing (R. 14-15). After a full analysis of the evidence (R. 11-15), the Board concluded that Weintraub's quarrel with Chairman on December 30, 1943, was a pretext utilized as a basis for dismissal, and that the real reason for Chairman's discharge was the Company's "extreme animus against Chairman because of his testimony at the Board hearing . . ." (R. 14). In reaching this conclusion, the Board rejected the examiner's contrary evaluation of the evidence.

In the interim between Chairman's discharge and the Board's order, Section 2 (3) of the Act was amended to exclude from the term "employee," any "individual employed as a supervisor." The Board unanimously held, in reliance upon the general saving statute which prevents the extinguishment of a liability incurred under a repealed statute unless the repealing act expressly provides for it,[11] that the Company's liability to return Chairman to his job and to make him whole for intervening wage losses was not released (R. 16).

III. The Board's Order

The order of the Board (R. 17-18) requires the Company to cease and desist from discriminating

[11] 61 Stat. 635, 1 U. S. C. (Supp. III), § 109, see *infra*, p. 113.

against any employee for filing charges or giving testimony under the Act or in any other manner interfering with the right of employees to file and prosecute charges and to give testimony under the Act; to reinstate Chairman with back pay;[12] and to post notices.

IV. Proceedings in the Court Below

On June 29, 1949, the Board filed in the court below a petition to enforce the Board's order (R. 1-7). On January 10, 1950, the court below rendered its opinion (R. 157-166), and on January 25, 1950, entered its decree enforcing the Board's order in full (R. 167-168).

The court below held, (1) that the amendment to Section 10 (e) of the National Labor Relations Act, changing the language from, "The findings of the Board as to the facts, if supported by evidence, shall be conclusive," to, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive," did not enlarge the scope of judicial review (R. 160-161), for "no more was done than to make definite what was already implied" (R. 161); (2) that the

[12] The Board, pursuant to its customary practice, imposed no back pay obligation for the nineteen month period intervening between the date of the intermediate report recommending dismissal of the complaint and the date of the Board's order (R. 16).

Board's rejection of the examiner's recommended findings of fact, and the Board's substitution of its own findings based on its independent evaluation of the evidence, were without relevance in determining on judicial review whether substantial evidence supports the facts as found by the Board (R. 161-163); (3) Judge Swan dissenting (R. 166), that the Board's finding that Chairman was discharged because of the testimony he gave was "within the bounds of rational entertainment" (R. 165); and (4) that the intervening repeal of the protection extended to supervi ors "did not extinguish the [Company's] 'liability' . . . to make restitution for the wrong—the discharge," and that "comprised the restoration of Chairman to his position as 'supervisory engineer,' and the payment of any loss he may have suffered meanwhile" (R. 165).

SUMMARY OF ARGUMENT

I. The change in the language used to define the standard of judicial review of Board findings of fact did not enlarge its scope, for no more was done than to make definite what was already implied. See Brief for Petitioner in No. 42, *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, pp. 47-92.

II. A. By statute the function of finding the facts is a responsibility committed to the Board's independent determination. Accordingly, when complaint is made that the Board "did not adopt the recommendations of its examiner," the short an-

swer is that the Board "had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence." *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285-286.

The great weight of authority in the courts of appeals supports the Government's position that an examiner's findings are recommendatory only; that they do not bind the Board; and that the Board's reversal of an examiner's findings neither alters the scope of judicial review nor detracts from the evidence supporting the Board's substituted findings. In this respect the role of the examiner vis-a-vis the Board is entirely different from the role of a trial court vis-a-vis an appellate court, or the role of a master vis-a-vis a trial court.

B. The function of the examiner is to serve as a conduit through which the facts are funnelled to the Board for its independent determination. Under the examiner's guidance, within the limits of the issues framed by the pleadings, a record is made in an adversary proceeding by which the contestants present their case. The examiner marshals and tentatively resolves the factual and legal issues involved, and his report presents the Board with the first disinterested analysis of the raw material of the record. With the examiner's report as their guidepost, the contestants by their exceptions urge the deficiencies of his recommended disposition, and thereby the issues for the Board's

determination are ordinarily brought into sharp focus. The examiner's function is intelligently to assemble the facts for the Board's independent adjudication. The fulfillment of this function of the examiner does not require that his recommendation, if rejected by the Board, should detract from the finality to be accorded Board findings.

C. The only aspect of administrative fact-finding which accords even surface plausibility to the argument that on judicial review weight should be attached to an examiner's recommendations which the Board has not adopted flows from the fact that the examiner but not the Board is in a position to evaluate demeanor evidence. But this advantage which the examiner possesses does not detract from the responsibility and power of the Board to base its findings as to credibility upon its view of the preponderance of the evidence. Neither when the Board accepts nor when it rejects recommendations of an examiner as to credibility does the propriety of its concurrence or disagreement with the examiner, as such, become the subject of judicial review. The question in all cases is whether the Board's own findings as to credibility are supported by substantial evidence. Where the Board has affirmed an examiner's credibility findings the examiner's evaluation of demeanor evidence supports the Board's resolution; where the Board has not relied upon the examiner's evaluation of demeanor, demeanor evidence plays no part on judicial review

of the Board's findings. The examiner's evaluation of demeanor may not be relied on in judicial review as a factor weighing against the Board's resolution. In such cases the rationality of the Board's finding must be determined from the bare record as though there had been no examiner's report.

Three considerations require this conclusion. (1) The value of demeanor evidence depends on the competence of the observer, and in judging the worth of an evaluation of demeanor, the Board rightly takes into account the varying ability of its examiners. On judicial review, this factor—the ability of the examiner—is not known to the court, and in the absence of relevant information as to this matter, intelligent review of the Board's disposition cannot take place, for review cannot be exercised in the absence of pertinent data. (2) Demeanor evidence is but one factor in the determination of credibility, and credibility is but one facet in the process of fact-finding. Every element in the fact equation—inference, weight, credibility, and so forth—interact with each other to influence the final fact determination, and a change in the emphasis on one item affects the significance of another and requires a re-ordering of the whole, including the evaluation of demeanor evidence. Moreover, the Board may regard the objective evidence bearing on credibility as itself outweighing the demeanor evidence on which the examiner may

have relied. As a result, in exercising its fact-finding function after receipt of the examiner's report, the Board is necessarily required to consider anew the influence to be allotted demeanor evidence in the light of its own independent and perhaps different appraisal of other evidence. This aspect of the Board's decisional process is not open to judicial inquiry. The court cannot, consistent with the substantial evidence rule, independently evaluate the significance of the competing evidence, in the light of which the Board discounted the demeanor evidence, for the court may not substitute its judgment for the Board's. Nor can the court inquire whether a rational fact-finder could have assessed the demeanor evidence differently if he had also evaluated differently the competing evidence. (3) Intelligent fact-finding, and in consequence intelligent judicial review, can exist without the aid of demeanor evidence. Judicial review loses none of its corrective value in excluding from its purview the question whether the Board properly discounted the examiner's recommendation insofar as it rested upon observation and inferences from the witness' demeanor. Accordingly, "Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner," for the "Board is in no case bound to follow the fact-findings or recommendations of an examiner." *National Labor*

Relations Board v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A.5).

D. The Administrative Procedure Act preserves the advisory character of the examiner's findings. The enhanced status which the APA imparts to the examiner does not imply any element of finality to his fact determinations, for though his findings are only advisory, the significant role he plays at the hearing meets the APA's purpose of endowing his position with independence, dignity, and responsibility. In fulfilling his function, the examiner does not in any way bind the agency to his findings. Whether the examiner makes an initial decision or recommends a decision, and either course may be adopted by the agency as it chooses, Section 8 (a) of the APA empowers the agency to exercise complete revisory authority over his findings. If the examiner only recommends a decision, plainly the agency retains full fact-finding power, for the very concept of a recommendation negatives compulsion or finality. If the examiner makes an initial decision, Section 8 (a) of the APA clearly states that on "appeal from or review of the initial decisions of such officers *the agency shall . . . have all the powers which it would have in making the initial decision*" (emphasis supplied). In either case, therefore, the APA confirms the agency's complete freedom of decision.

E. Not only does the relationship of the agency to the examiner compel the conclusion that no finality

inheres in his findings, but the relationship of agency to court requires the same conclusion. (1) The objective in reposing the fact-finding function in the Board is to secure its experienced and unified judgment in the specialized field committed to its determination. For this reason, on judicial review, findings of fact are "conclusive" unless irrational. But, division between the Board and its examiner does not suggest that the Board's view is irrational, for contrariety of opinion does not imply unreasonableness. (2) As the court below stated, the ascription of some detractive weight to the Board's reversal of its examiner is too impalpable a standard to be applied on judicial review, and it also invites, by its very vagueness, a substitution of judicial for administrative judgment. Furthermore, it would create two standards of review, one to be applied to the concurrent findings of Board and examiner and a more rigorous one to be applied where division exists, although the statute provides for only a single standard.

III. Substantial evidence on the record considered as a whole supports the Board's finding that Chairman was discharged because he gave testimony at a Board hearing. The subsidiary elements of this finding are: (1) By testifying at a Board representation hearing on November 30, 1943, in opposition to the stand taken by petitioner, Chairman aroused the strong animosity of Chief Engineer Kende, who desired to discharge him because

of the adverse evidence he gave; (2) Kende promptly investigated Chairman's employment history, in an effort to unearth a basis for discharge; because he could not find support for the immediate reasons which suggested themselves, inefficiency and Communist affiliation, he did not then dismiss Chairman, but his desire and intention to uncover a pretext warranting discharge continued unabated; (3) on January 24, 1944, eight weeks later, Kende summarily discharged Chairman, utilizing as his pretext an incident of asserted insubordination which had occurred three and one-half weeks before on December 30, 1943. In this view of the facts the discharge violated Section 8 (1) and (4) of the Act whether or not in belatedly bringing the incident to Kende's attention Weintraub was motivated in part or in whole by his knowledge of Kende's desire to find some pretext which would enable him to dismiss Chairman. The crucial question is whether Kende's animus against Chairman because of his testimony played a part in Kende's decision to discharge him. The Board's conclusion that it did, as the court below held, is a rational appraisal of the evidence.

IV. Despite the intervening repeal of the statutory protection extended to supervisors, the obligation to grant reinstatement and back pay to a supervisor wrongfully discharged because he gave testimony is a "liability" preserved from extinguishment by the general saving statute. The

employer is under a responsibility to observe the statutory command while it is still in effect, and his answerability for failure to do so is a "liability incurred." It is no less a "liability" because of the public character of an award of reinstatement with back pay, for sanctions rooted in the public interest are embraced within the sweep of the term.

The general saving statute is to be "treated as if incorporated in and as a part of subsequent enactments," and it "must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect" to it. *Great Northern Ry. Co.* v. *United States,* 208 U.S. 452, 465. There is no "express declaration" remitting the obligation to reinstate with back pay a wrongfully-discharged supervisor; on the contrary, Congress rejected a proposal which would have released this obligation. Nor is any remission of a liability to redress a past wrong to be implied from the present policy of the amendments which denies future protection to supervisors. To infer from the future immunity of an employer the release of a liability incurred in the past "is to take too narrow a view of the public policy involved," for current vulnerability for present acts "is no reason why the supervisors who have been wrongfully discharged should not be restored to their positions with reimbursement of their loss." *Eastern Coal Corp.* v. *National Labor*

Relations Board, 176 F. 2d 131, 136-137 (C.A. 4). Furthermore, the general saving statute itself expresses an affirmative and existing policy to protect persons who act in reliance upon the succor of the law as it stands and to prevent rewarding wrongdoers who fail to observe prevailing standards.

ARGUMENT

I. The 1947 Amendments to the National Labor Relations Act Did Not Broaden the Scope of Court Review of Board Findings of Fact

As the court below explained, the change in the language used to define the standard of judicial review of Board findings of fact did not enlarge its scope, for "no more was done than to make definite what was already implied" (R. 161). Our position on this question is fully stated in our brief before this Court in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 42, this Term, pp. 47-92, to which the Court is referred.

II. An Examiner's Findings are Advisory Only, and in the Exercise of Its Authority to Find Facts, the Board May Reverse the Examiner's Findings Without Thereby Detracting from the Substantiality of the Board's Substituted Findings

In the instant case the Board rejected certain factual conclusions recommended by the examiner for the reason that, in the Board's view, contrary

conclusions were more reasonable and more consistent with the record as a whole. The court below held that, although in its view, the findings recommended by the examiner were not clearly erroneous, the Board could reasonably have reached the conclusions that it did, and that its findings were therefore supported by substantial evidence. The court further held that without ascribing to the examiner's report a finality similar to that ascribed to a master's report by Rule 53 (e) (2) of the Federal Rules of Civil Procedure, it could not regard the Board's rejection of the examiner's recommendations as "a factor in the court's own decision."

It is the Government's position that in so holding the court below properly applied the substantial evidence rule. The rule rests upon the premise that the function of initial fact finding was committed by Congress to the independent judgment of the Board, and that findings recommended by an examiner, unlike those of a master, are advisory only. The rule further contemplates that while the Board shall base its findings upon the "preponderance" of the evidence (Section 10 (c) of the Act), the Board's findings shall be sustained on judicial review unless shown to be unreasonable. This means that Board findings shown to be reasonable on the record considered as a whole may not be upset even though the reviewing court may believe that contrary findings would be equally, or even more reasonable. *National Labor Relations Board* v. *Ne-*

vada Consolidated Copper Corp., 316 U. S. 105; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206. Review of Board findings under this rule, we submit, is not affected by the fact that an examiner had recommended a contrary finding. To give weight to this factor would, *pro tanto*, ascribe to the examiner's findings a finality incompatible with the advisory character of his report, deprive the Board of power to base findings upon its view of the preponderance of the evidence, and involve the judiciary in reweighing of the evidence, a task incompatible with the limitations of the substantial evidence rule.

In addition to the decision of the court below,[13] this position has been sustained in full by the decisions of the Courts of Appeals for the Third,[14] Fifth,[15] Eighth,[16] and Ninth [17] Circuits. With ref-

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[13] See also, *National Labor Relations Board* v. *Air Associates*, 121 F. 2d 586 (C.A. 2); *National Labor Relations Board* v. *Hamel Leather Co.*, 135 F. 2d 71 (C.A. 1).

[14] *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. 2d 221, 225 (C.A. 3), certiorari denied, 311 U.S. 705; *Burk Bros.* v. *National Labor Relations Board*, 117 F. 2d 686, 688 (C.A. 3), certiorari denied, 313 U.S. 588; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 882-883 (C.A. 3), certiorari denied, 319 U.S. 751; *National Labor Relations Board* v. *Blatt Co.*, 143 F. 2d 268, 272, n. 11 (C.A. 3), certiorari denied, 323 U.S. 774; see also *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 496, n. 4 (C.A. 3); *Berkshire Knitting Mills* v. *National Labor Relations Board*, 139 F. 2d 134, 137 (C.A. 3), certiorari denied, 322 U.S. 747.

[15] *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A. 5); *Continental Box Co.*

erence to other administrative agencies, the same view has in substance been taken by this Court in relation to the Federal Radio Commission; [18] by the Fourth Circuit in relation to the Federal Trade Commission; [19] and by three-judge courts in relation to the Interstate Commerce Commission.[20] And it is likewise the opinion of administrative agencies.[21]

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v. *National Labor Relations Board*, 113 F. 2d 93, 97 (C.A. 5); *National Labor Relations Board* v. *Brown Paper Mill Co.*, 133 F. 2d 988, 990 (C.A. 5).

[16] *National Labor Relations Board* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 16-17 (C.A. 8).

[17] *National Labor Relations Board* v. *Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 830-831, 834 (C.A. 9). See also *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F. 2d 671 (C.A. 9).

[18] *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 285-286; cf., *Smith* v. *Bowles*, 142 F. 2d 63 (E.C.A.); *Ladner* v. *Bowles*, 142 F. 2d 566, 567-568 (E.C.A.); *Direct Realty Co.* v. *Porter*, 157 F. 2d 434, 438 (E.C.A.). The Emergency Court of Appeals repeatedly stressed that the responsibility of finding facts was vested in the Price Administrator and he could not delegate performance of the function to a subordinate official.

[19] *Bond Crown & Cork Co.* v. *Federal Trade Commission*, 176 F. 2d 974, 979-980 (C.A. 4). See also, *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 63 F. 2d 108 (C.A. 2).

[20] *Beard Laney, Inc.* v. *United States*, 83 F. Supp. 27, 33 (E. D. S. C.), affirmed, 338 U.S. 803; *Lang Transport Corp.* v. *United States*, 75 F. Supp. 915, 925 (S. D. Cal.); *Watson Brothers Transport Co.* v. *United States*, 59 F. Supp. 762, 776 (D. Neb.).

[21] *United States* v. *California*, 55 I. D. 532, 540-546 (Secretary of the Interior); *White*, 1 S. E. C. 574, 576-577; *Kinner*

Petitioner asserts, however, that on judicial review of the Board's findings of fact, "a reviewing court must, as a matter of law, give weight to the reversal of an examiner in assessing the substantiality of the Board's findings," and that the absence of concurrence between the Board and the trial examiner derogates from the substantiality of the evidence supporting the Board's conclusion (Br., p. 35). To support its contention, petitioner relies upon the decision of the Court of Appeals for the Seventh Circuit in *Staley Mfg. Co.* v. *National Labor Relations Board*,[22] and the few subsequent

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Airplane and Motor Corp., 2 S. E. C. 943, 945; *Wright*, 3 S. E. C. 190, 213; Att'y. Gen. Comm Ad. Proc., SEC, Sen. Doc. No. 10, Part 13, 77th Cong., 1st Sess., 87-88 and n. 177 (The Securities and Exchange Commission "has persistently been at pains to point out" that "the trial examiner's report is advisory only and in no way binding upon the Commission"; that "the record in each case is reexamined meticulously"; and examiner's findings involving "conflicts of factual testimony and credibility" have been reversed.); Att'y. Gen. Comm. Ad. Proc., United States Maritime Comm., Sen. Doc. No. 186, Part 4, 76th Cong., 3d Sess., 14 (As to the Maritime Commission "in no case does the trial examiner determine the final result; and, of course, there is no question concerning the power of the Commission, which did not see and hear the witnesses, to make a valid decision based upon its consideration of the 'cold record.' ").

[22] 117 F. 2d 868, 878 (C.A. 7), criticized in, Note, 54 Harv. L. Rev. 687 (1941); 1 Pike & Fischer Ad. Law (Current Text) § 63a. 16-5 to 7. The Seventh Circuit has adhered to the rule of the *Staley* case in *Kidder Oil Co.* v. *Federal Trade Commission*, 117 F. 2d 892, 895, 899 (C.A. 7); *Wyman-Gordon Co.* v. *National Labor Relations Board*, 153 F. 2d 480, 483 (C.A. 7). In neither case was the reasoning of the *Staley* opinion elaborated upon. The Seventh Circuit distinguished

cases which have indicated concurrence with that view.[23] In *Staley,* no variance existed between the Board and the examiner as to the basic facts, but, overruling the examiner's finding, the Board found as an ultimate conclusion of fact that a labor organization was company-dominated. In this context, the Seventh Circuit held that (117 F. 2d, at 878):

> . . . while the report of the Examiner is not binding on the Board, yet where it reaches a conclusion opposite to that of the Examiner, . . . the report of the latter has a bearing on the question of substantial support and materially detracts therefrom.

In essence, the *Staley* view endows the findings of an examiner with an indefinite element of

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Staley in *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. 2d 881, 889-890 (C.A. 7), certiorari denied, 313 U.S. 559.

[23] The Sixth Circuit in a single case, *National Labor Relations Board* v. *Ohio Calcium Co.*, 133 F 2d 721, 724 (C.A. 6), indicated that where there was both difference of opinion among the Board members and reversal of the trial examiner, doubt might be cast upon the basic findings of fact. But contrast the statement of the court in *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. 2d 38, 43 (C.A. 6): "The report of the examiner is merely a recommendation subject to review by the Board, and it is the Board's findings and order that are . . . in issue, and not the examiner's recommendation. If the findings are supported by substantial evidence and sustain the order it becomes our duty to direct enforcement." The Eighth Circuit in *Wilson & Co.* v. *National Labor Relations Board,* 123 F. 2d 411, 418 (C.A. 8), first took the *Staley* view but thereafter in *National Labor Relations Board* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 16-17 (C.A. 8), unequivocally repudiated it.

finality. Such finality attaches, not merely to the determination of subsidiary issues of fact, but also to ultimate conclusions of fact. Under the *Staley* rule a bifurcated standard of review would exist, depending upon the posture of the Board's decision in relation to the examiner's report. If the findings of the Board and the examiner concur, the inquiry of the reviewing court ends when it is satisfied that substantial evidence exists to support the concurrent determination. If, on the other hand, the findings of the Board and the examiner differ, the quantum of proof which would otherwise meet the requirement of substantial evidence must be augmented, and this increase is necessary in order to justify the Board's disturbance of the examiner's finding. To whatever extent the Board must justify its reversal of the examiner under that rule, the focus on review shifts from the Board's findings to those of the examiner. And, if the Board could justify its reversal of the examiner's findings short of showing them to have been "clearly erroneous," it could do so only by demonstrating to the satisfaction of the court that the preponderance of the evidence was against the examiner's finding. Judicial inquiry then, would be directed not to whether the Board's finding is supported by substantial evidence, but rather, to whether the Board's finding is supported by a preponderance of the evidence. This would involve nothing less than reweighing the evidence *de novo*. See Brief

for the National Labor Relations Board in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 42, this Term, pp. 76-78.

Contrary to petitioner's contention, nothing in the National Labor Relations Act, either before or after amendment, the Administrative Procedure Act (A.P.A.), or the legislative history of those statutes indicates that Congress contemplated a result which so distorts the relationship of the Board to its examiners and of the Board to the reviewing court. More particularly, the amendments to the NLRA are even more explicit than the original enactment in requiring that *the Board* find the facts in accordance with *its independent judgment* of the record. The function of the examiner continues to be, as it always has been, intelligently to assemble the facts and to provide all parties a full opportunity to present facts and argument for the Board's ultimate determination. The enhanced status which the APA gives the examiner is designed to improve the quality of the performance of this function, and not, as petitioner contends (Br., pp. 27-28, 34), to impart any element of finality to his recommendations (*infra*, pp. 67-69). The requirement that the examiner issue a report is part of the intelligent performance of his intermediate, advisory role, and not, as petitioner contends (Br., p. 29), to bind the Board to the recommended findings embodied in it (*infra*, pp. 69-76). Furthermore, the petitioner

overlooks the fact that the examiner's report was initially made mandatory by the APA, and the APA is explicit that the examiner's report shall not bind the agency (*infra*, pp. 64-65, 71-79). The amendments to the NLRA merely carried over this existing requirement without change in its purpose.

We turn now to a particularized consideration of the issue thus raised.

A. THE BOARD IS THE FINDER OF FACT

In the process leading to formal adjudication of unfair labor practice cases, the complaint may be issued by a subordinate official (NLRA, Sec. 10 (b)), the hearing may be conducted by an examiner (NLRA, Sec. 10 (b)), and in that event the latter is required to render a "proposed report" after the close of the hearing (NLRA, Sec. 10 (c)). In sharp contrast to the express delegability of these functions, the power of final fact-finding is withheld from subordinate officials and committed exclusively to the Board. Section 10 (c) of the National Labor Relations Act unequivocally commands that:

> If upon the preponderance of the testimony taken *the Board* shall be of the opinion that any person named in the complaint has engaged in . . . any . . . unfair labor practice, then *the Board* shall state its findings of fact and shall issue [an appropriate order].

And in like fashion it states that:

> If upon the preponderance of the testimony taken *the Board* shall not be of the opinion that the person named in the complaint has engaged in . . . any . . . unfair labor practice, then *the Board* shall state its findings of fact and shall issue an order dismissing the . . . complaint. [All italics are supplied.]

It is thus the Board's "opinion" upon the "preponderance of the testimony" which is required, and it is the Board which "shall state its findings of fact." This emphasis upon obtaining the Board's personal, independent judgment of the facts is stressed in Section 4 (a) of the Act:

> The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations.

This provision, which was added by the amended Act, does not, as petitioner contends (Br., pp.

30-31), imply any change in the examiner's advisory role. On the contrary, the requirement that the examiner shall not consult with the Board emphasizes the insistence upon the Board members' personal judgment of the facts (see S. Rep. No. 105, 80th Cong., 1st Sess., 10). And the requirement that the examiner's report shall not be reviewed by anyone other than the Board, apart from its plain stress upon the Board's independent adjudicatory function, means only that while performing his intermediate role, the examiner like the individual Board members shall make up his own mind and shall be uninfluenced in the discharge of his responsibility "by the supervisory employees in the Trial Examining Division." S. Rep. No. 105, 80th Cong., 1st Sess., 9.

Statutory finality attaches to an examiner's report only "if no exceptions are filed" to it within a prescribed time, and in that event, his "recommended order shall become the order of the Board and become effective as therein prescribed" (NLRA, Sec. 10 (c)). The finality which flows from the absence of exceptions is a "device" adopted to "expedite final determinations and reduce the work load of Board members and their legal assistants." [24] Such finality, in effect the consequence of a consent determination, has no

[24] 93 Cong. Rec. 6444-5; see also, 93 Cong. Rec. 6860.

counterpart in a case contested before the Board. If exceptions are filed to the intermediate report, the procedure is, as the Board has explained, that:[25]

> . . . the Board, with the assistance of the legal assistants to each Board member who function in much the same manner as law clerks do for judges, reviews the entire record, including the trial examiner's report and recommendations, the exceptions thereto, the complete transcript of evidence and the exhibits, briefs, and arguments. The Board does not consult with members of the trial examining staff or with any agent of the general counsel in its deliberations. It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner. The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action.

In this manner the statutory mandate is met, namely, "that the Board shall act only on the 'preponderance' of the testimony—that is to say, on the weight of the credible evidence," and that its decisions "should indicate an actual weighing

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[25] National Labor Relations Board, Rules and Regulations, Series 5, and Statements of Procedure, as amended August 19, 1948, Sec. 202.12, in 29 CFR § 101.12 (1949).

of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 53-54.

The position of the Board as fact-finder, subject to a single standard of review and unencumbered by limitations flowing from the examiner's preliminary report, is illustrated by the hearing procedure established as an incident to the investigation of questions of employee representation, since the statute provides the same scope of review for findings made in both representation and unfair labor practice cases. In determining whether a question of representation exists, the "hearing may be conducted by an officer or employee of the regional office," [26] but the latter "shall not make

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[26] As an adjunct to the Board's nonadversary investigation of employee representatives *(Inland Empire District Council v. Millis,* 325 U.S. 697, 706-707), the hearing provided by Section 9 (c) (1) of the National Labor Relations Act is excepted from the requirements of Sections 7 and 8 of the Administrative Procedure Act by virtue of the exemption of agency hearings which involve "the certification of employee representatives" (APA, Sec. 5 (6)). The Board desired the exemption "because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition" in investigating representation questions. Committee Print, S. 7, 79th Cong., 1st Sess., June 1945, 8, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 23. The exemption was explained as appropriate "because these determinations rest so largely upon an election or the availability of an election." S. Rep. No. 752, 79th Cong., 1st Sess., 16; H. Rep. No. 1980, 79th

any recommendations with respect thereto" (NLRA, Sec. 9 (c) (1)). It is "the Board" which "finds upon the record of such hearing that such a question of representation exists" (NLRA, Sec. 9 (c) (1)), and it is "[t]he Board" which "shall decide" the unit appropriate for the purposes of collective bargaining (NLRA, Sec. 9 (b)). Issues of fact determined in a representation proceeding, which are not relitigable in an unfair labor practice proceeding if the issue becomes pertinent therein,[27] are entitled on judicial review to the same finality which attaches to facts found through the Board-examiner process.[28] In either procedural posture, Section 10 (e) of the Act plainly states that it is the Board's findings of fact, not those of the examiner, which may be contested, and it is the Board's findings of fact, not those of the examiner, which are conclusive:

Cong., 2d Sess., 27; 92 Cong. Rec. 5651; all in Sen. Doc. No. 248, 79th Cong., 2d Sess., 202, 261, 360.

[27] *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 161-162; *National Labor Relations Board* v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 16 (C.A. 1), certiorari denied, 336 U.S. 903; *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435, 441 (C.A. 7); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 201 (C.A. 6), certiorari denied, 328 U.S. 866.

[28] *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491-492. Representation determinations are judicially reviewable solely through the avenue of an unfair labor practice proceeding. NLRA, Sec. 10 (d); *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401; *Norris, Inc.* v. *National Labor Relations Board*, 177 F. 2d 26 (C. A. D. C.).

> The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

Thus the statutory scheme plainly commits fact determination to the Board; "the fact-finder [is] the Board, not the trial examiner." [29] Here, no less than in *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285-286, when complaint is made that the Board "did not adopt the recommendations of its examiner," the short answer is that the Board "had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence." [30]

The scope of the Board's decisional responsibility in relation to an examiner's recommendation is thus fundamentally different from the scope of decisional responsibility possessed by a trial court in reviewing a master's findings. Rule 53 (e) (2)

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[29] *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, 588 (C.A. 2); see also, *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. 2d 221, 225 (C.A. 3), certiorari denied, 311 U.S. 705; *Burk Bros.* v. *National Labor Relations Board*, 117 F. 2d 686, 688 (C.A. 3), certiorari denied, 313 U.S. 588; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 882-883 (C.A. 3), certiorari denied, 319 U.S. 751; *Berkshire Knitting Mills* v. *National Labor Relations Board*, 139 F. 2d 134, 137 (C.A. 3), certiorari denied, 322 U.S. 747.

[30] See also *Smith* v. *Bowles*, 142 F. 2d 63 (E. C. A.) (Price Administrator).

of the Federal Rules of Civil Procedure provides that in non-jury actions "the court shall accept the master's findings of fact unless clearly erroneous." Congress did not so restrict the power and responsibility of the Board in relation to an examiner's report. And the absence of such restriction, as we shall show, was not a result of mere inadvertence, but reflects the deliberate intention of Congress to obtain in every contested case the benefits of the Board's personalized judgment on all issues of fact and law. It is hardly possible that, having enjoined the Board thus to exercise its independent judgment, Congress intended that difference between the Board and its examiner should itself cast doubt upon the rationality of the Board's findings, or alter the scope of judicial review.

B. THE EXAMINER IS THE MEANS BY WHICH FACTS ARE INTELLIGENTLY FUNNELLED TO THE BOARD FOR ITS INDEPENDENT DETERMINATION

At the root of adjudication, fact-finding is committed to the five members of the Board, or a panel of three (NLRA, Sec. (3 (b)), in order that it may reflect (1) their informed evaluation of fact questions based on the insight and experience of their everyday probing into industrial events, (2) the collective judgment of their joint deliberation,[31]

[31] "There are recognized advantages of adjudication by group deliberation rather than by individual action; and where a deciding body rather than a single deciding officer

and (3) the uniformity of approach of their centralized administration. Fact-finding in labor disputes, as explained by Judge Learned Hand, calls for and is enhanced by the competence of those adept in it (*National Labor Relations Board* v. *Standard Oil Company,* 138 F. 2d 885, 888 (C. A. 2)):

> Like any other group of phenomena, when isolated and intensively examined, these relations appear to fall into more or less uniform models or patterns, which put those well skilled in the subject at an advantage which no bench of judges can hope to rival.

As an instance of this observation, in noting the skepticism with which the Board regarded a body of testimony, this Court has stated that "Out of repeated instances of hearing the same thing a generalization as to its worth will almost inevitably emerge in the thoughts of a tribunal." *National*

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is provided in the agency's organization, it is obviously desirable to realize to the greatest possible extent the advantages thus offered. A decision (whether it be the initial effective decision or a decision on administrative review) which may reverse or modify the conclusions of the officer who presided at the hearing is usually better left to the joint deliberation of a body than to one of its members. The analogy of judicial appellate tribunals is persuasive here. Apart from this factor, joint deliberation should usually produce an inherently better result where adjudication involves difficult questions, whether of law, fact, of policy or of the exercise of discretion." Benjamin, *Administrative Adjudication In The State of New York*, 240-241 (1942).

Labor Relations Board v. *Donnelly Garment Co.*, 330 U. S. 219, 231.

To realize these values, "Congress has deemed it wise to entrust the finding of facts" to the Board, and to "apply an orderly, informed and specialized procedure to the complex administrative problems arising in the solution of industrial disputes". *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208-209. And so, it is the Board which is endowed with the "power to draw inferences from the facts" and which has the "function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 597. This is especially pertinent when it is recalled that fact-finding is not limited to what it connotes "in the narrow, literal sense" but is also "based upon judgment and prediction." *Securities and Exchange Commission* v. *Central-Illinois Corp.*, 338 U. S. 96, 126. These advantages would be lost if an element of finality were to attach to an examiner's findings, for the result would be to derogate from the Board's capacity to reach its own uninhibited findings.

The assumption that an examiner's findings are more than advisory "presses too hard the analogy between trial examiner and Board and trial court and appellate court." *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 882 (C. A. 3), certiorari denied, 319 U. S. 751. The

examiner, instead of being a separate tribunal of first instance, is merely an integral link in the Board's single, unified process of decision. Unlike a trial court, the examiner does not decide, he only recommends to the Board.

Manifestly the Board's case load precludes it from presiding at hearings, and in response to the "practicable administrative" necessity for "obtaining the aid of assistants," the examiner system was evolved. "Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates." *Morgan* v. *United States,* 298 U. S. 468, 481. The examiner's role in the Board's process of adjudication is summarized in its Rules and Regulations.[32]

> It shall be the duty of the trial examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:
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> (a) To administer oaths and affirmations;

[32] National Labor Relations Board, Rules and Regulations, Series 5, and Statements of Procedure, as amended August 19, 1948, Sec. 203.35, in 29 CFR § 102.35 (1949).

(b) To grant applications for subpenas;

(c) To rule upon petitions to revoke subpenas;

(d) To rule upon offers of proof and receive relevant evidence;

(e) To take or cause depositions to be taken whenever the ends of justice would be served thereby;

(f) To regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question;

(g) To hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases;

(h) To dispose of procedural requests or similar matters, including motions referred to the trial examiner by the regional director and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened prior to issuance of intermediate reports (recommended decisions);

(i) To make and file intermediate reports in conformity with section 8 of the Administrative Procedure Act;

(j) To call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence;

(k) To take any other action necessary under the foregoing and authorized by the published Rules and Regulations of the Board.

At the close of the hearing, a party may argue orally before the examiner and may submit a brief and proposed findings and conclusions.[33] After the hearing, "the trial examiner shall prepare an intermediate report and recommended order, *but the initial decision shall be made by the Board.* Such report shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law or discretion presented on the record, and the recommended order shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the act" (emphasis supplied).[34]

After issuance of the report, the case is transferred to the Board, together with a record of all the proceedings theretofore had,[35] and the case is thereupon ripe for the Board's decision. Exceptions may be filed to the intermediate report, recommended order, or to "any other part of the record or proceedings," together with a supporting

[33] *Id.*, Sec. 203.42 in 29 CFR § 102.42 (1949).
[34] *Id.*, Sec. 203.45, in 29 CFR § 102.45 (1949).
[35] *Ibid.*

brief, and the "exceptions and briefs shall designate by precise citation the portions of the record relied upon." [36] "No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings." [37] "Upon the filing of a statement of exceptions and briefs," retaining full power of decision, "the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may close the case upon compliance with the recommendations of the intermediate report or may make other disposition of the case." [38]

The relationship of the examiner to the adjudicatory process of the Board is thus apparent from his role in it: (1) Under the examiner's guidance, within the limits of the issues framed by the pleadings, a record is made in an adversary proceeding by which the contestants—the Board's prosecutory staff, the party proceeded against, and at times the private complainant—present their story. (2) The examiner marshals and tentatively resolves the

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[36] *Id.*, Sec. 203.46 (a), in 29 CFR § 102.46 (a) (1949). If no exceptions are filed, the recommended order becomes the order of the Board without more. *Id.*, Sec. 203.48 (a), in 29 CFR § 102.48 (a) (1949); *supra*, pp. 34-35.

[37] *Id.*, Sec. 203.46 (b), in 29 CFR § 102.46 (b) (1949). In a contested case, the Board may, however, *sua sponte* consider aspects of the case to which no exceptions were filed.

[38] *Id.*, Sec. 203.48 (b), in 29 CFR § 102.48 (b) (1949).

factual and legal issues, and his report presents the Board with the first disinterested appraisal and analysis of the raw material of the record. (3) With the examiner's report as their guidepost, the contestants by their exceptions urge the deficiencies of his recommended disposition, and thereby the issues for the Board's determination are ordinarily brought into sharp focus.

The examiner is thus the means by which cases are intelligently funneled to the Board for its independent adjudication.[39] The fulfillment of this function of the examiner suggests no need for and implies no attribute of finality to his report. Indeed, absence of any degree of finality is an important factor in the successful functioning of the examiner system. For the "necessity of justifying the result of adjudication in each case to an administrative superior with power of decision may well lead to better adjudication by the hearing officer (in the form of recommendations) than he would produce if his work were not thus regularly subjected to review." [40]

A concrete example will illustrate the essential position of the examiner as an assembler of facts

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[39] The examiner "is only the conduit through which the [Interstate Commerce] Commission receives the facts on which to base its action." *Empire Trails, Inc.*, v. *United States*, 53 F. Supp. 373, 376 (D. D. C.) (three-judge court).

[40] Benjamin, *Administrative Adjudication In The State of New York*, 224 (1942).

for the Board's independent determination. In 1947, to meet the amendments of the National Labor Relations Act, the International Typographical Union adopted a collective bargaining policy to be applied by its local unions throughout the country. To test the nature and legal effect of this policy in its various ramifications, five separate proceedings were instituted, two of which were consolidated for hearing, and hearings were conducted by four separate examiners.[41] As was to be expected, the diversified hearings resulted in a variation of views among the four examiners on numerous phases of an essentially unitary situation. Upon consideration of the cases by the Board, the facts adduced at the multiple hearings united to present the Board with facets of a single pattern of conduct, and the Board's unified adjudication of the issues replaced the diffusion of treatment by the examiners. Yet, if the Board was not entirely free to decide the cases without regard to the views of the examiners, the result would be either an absence of uniformity or a greater vulnerability on judicial review in those cases where the Board's

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[41] *American Newspaper Publishers Association*, 86 NLRB 951, consolidated for hearing with *Chicago Newspaper Publishers Association*, 86 NLRB 1041 (Trial Examiner Arthur Leff); *Graphic Arts League*, 87 NLRB, No. 124 (Trial Examiner William R. Ringer); *Union Employers' Section of Printing Industry of America*, 87 NLRB, No. 164 (Trial Examiner Howard Meyers); *Daily Review Corporation*, 87 NLRB, No. 101 (Trial Examiner Peter F. Ward).

conclusion did not happen to coincide with that of a particular examiner.

C. DEMEANOR EVIDENCE IS BUT PART OF THE PROCESS OF FACT-FINDING AND IT IS NO EXCEPTION TO THE RULE THAT AN EXAMINER'S FINDINGS ARE ADVISORY ONLY

Uncritical acceptance of the analogy between court and master aside, the only aspect of administrative fact-finding which would accord surface plausibility to the assumption that this Court must attach weight to an examiner's findings reversed by the Board is that which relates to an examiner's resolution of issues as to credibility which are based, in part, on his evaluation of demeanor evidence. But before examining the role of the examiner's evaluation of demeanor evidence in the Board's decisional process generally, and its impact upon judicial review of Board findings, it must be emphasized that this aspect of the fact-finding process is not involved in this case. As we shall see (*infra*, pp. 103-104), in reversing the examiner's finding, the Board did not disturb any judgment of the examiner based upon his observation of the witnesses' demeanor, but merely drew from the objective facts in the record conclusions different from those drawn on the basis of the same record by the examiner. And since, except where credibility recommendations are based upon the examiner's evaluation of demeanor evidence, the Board is in as good a position as the examiner

to resolve issues as to credibility, recommendations as to credibility such as those made by the examiner in this case cannot be treated differently from other recommendations, either as to subsidiary or as to ultimate facts, which there is no justification for treating as final or binding upon the Board.

While all other evidence upon which a trial examiner bases his recommendations is preserved by the record, thereby leaving the Board in as good a position as the examiner to evaluate the relative weight of evidence, draw inferences or resolve conflicts, demeanor evidence is not. Where demeanor evidence plays a part in an examiner's recommendation as to credibility, the Board, since it cannot by "autoptic proference" [42] appraise the demeanor evidence, must either give weight to the examiner's evaluation, or lose the advantage of such evidence in determining the question of credibility. In deference to the value of demeanor evidence, and because of its essentially incommunicable nature, the Board has evolved a working rule which it has recently restated as follows (*Standard Dry Wall Products, Inc.*, 91 NLRB, No. 103):

> * * * In all cases, save only where there are no exceptions to the Trial Examiner's proposed Report and Recommended Order, the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the

[42] 1 Wigmore, *Evidence*, § 24, p. 396 (3d Ed., 1940).

preponderance of the evidence.[1] Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings. Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility,[2] and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor.[3] Hence

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[1] See Sec. 10 (e) of the Act, and compare Sec. 4 (a). See also: *Consumers Power Co.* v. *N.L.R.B.*, 113 F. 2d 38, 43 (C.A. 6); *N.L.R.B.* v. *Air Associates, Inc.*, 121 F. 2d 586, 588 (C.A. 2); *N.L.R.B.* v. *Botany Worsted Mills*, 133 F. 2d 876, 882-883 (C.A. 3); *N.L.R.B.* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 16 (C.A. 8); *N.L.R.B.* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A. 5); *N.L.R.B.* v. *Universal Camera Corp.*, 179 F. 2d 749, 752-753 (C.A. 2), cert. granted May 29, 1950, 339 U.S. 962.

[2] But only one of the many factors by which credibility is tested. See *Eastern Coal Corporation*, 79 NLRB 1165, 1166 affd. 176 F. 2d 131 (C.A. 4). Compare V. Wigmore, Evidence, Sec. 1396 (1940). See also: *N.L.R.B.* v. *Sartorius*, 140 F. 2d 203, 205 (C.A. 2), enforcing 40 NLRB 107, in which no Intermediate Report was issued; *N.L.R.B.* v. *Brown Paper Company, Inc.*, 133 F. 2d 988, 990 (C.A. 5); *N.L.R.B.* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A. 5).

[3] *Lancaster Foundry Corporation*, 75 NLRB 255, 256; *Robbins Tire & Rubber Company, Inc.*, 69 NLRB 440; *Vermont American Furniture Corp.*, 82 NLRB 408; *Minnesota Mining & Mfg.*, 81 NLRB 557. Compare: *Security Warehouse and Cold Storage Co.*, 35 NLRB

we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect.

857, 883-884, enfd., 136 F. 2d 829 (C.A. 9); *Bahan Textile Machinery Co.*, 43 NLRB 97, 100; *Bohn Aluminum and Brass Corp.*, 67 NLRB 847, 849; *Cedartown Yarn Mills*, 76 NLRB 571, 573.

The Board has consistently applied this working rule from the beginning of the Act's administration [43] to the present date.[44]

The Board's working rule is consonant with the examiner's advisory function in making a preliminary evaluation of the evidence. The rule announces at the outset the weight the Board will ascribe to demeanor evidence. By acquiring the examiner's "estimate of the veracity of witnesses," the Board becomes as "fully informed" as the

[43] *Fashion Piece Die Works, Inc.*, 6 NLRB 274, 279, enforced, 100 F. 2d 304 (C.A. 3); *National Casket Co., Inc.*, 12 NLRB 165, 172-173, enforced as modified, 107 F. 2d 992 (C.A. 2); *Valley Mould and Iron Corp.*, 20 NLRB 211, 219, 220, enforced, 116 F. 2d 760, 763 (C.A. 7).

[44] *Alex. Milburn Co.*, 78 NLRB 747, 748, n. 2; *Eastern Coal Corp.*, 79 NLRB 1165, 1166, enforced, 176 F. 2d 131 (C.A. 4); *Northeastern Indiana Broadcasting Co.*, 88 NLRB, No. 238. At times, in stating the working rule, the Board has said that it will not reverse an examiner's credibility findings "unless they are clearly erroneous." *Minnesota Mining & Mfg. Co.*, 81 NLRB 557, 559, n. 13, enforced, 179 F. 2d 323 (C.A. 8); *Vermont American Furniture Corp.*, 82 NLRB 408, 409, n. 3. But the difference in phraseology does not reflect a difference in approach. Other agencies have followed the same course. *Supra*, p. 27, n. 21.

nature of formal administrative adjudication permits.[45] And no more is inherently possible than that, where otherwise feasible (*infra*, pp. 64-65), "he who observes the witness and listens to the evidence must transmit his observations or conclusions to those others who, whether they are superiors or associate members of the same agency, are to decide and this may be done in the form of tentative findings or by a report or recommendations. . . ." [46]

That the examiner alone is in a position to evaluate demeanor evidence does not, however, relieve the Board of its responsibility to decide questions of credibility, as all other questions of fact, on the basis of the fair preponderance of the

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[45] Benjamin, *Administrative Adjudication In The State of New York*, 226 (1942); see also, *id.*, at 231.

[46] Wolfe, C. J., concurring in *Crow* v. *Industrial Commission*, 104 Utah 333, 345, 140 P. 2d 321, 326. See also, *United States* v. *California*, 55 I. D. 532, 540-546 (Secretary of the Interior). Thus, the Attorney General's Committee recommended, with respect to the Federal Trade Commission, that "where the examiner's judgment was influenced by his observation of the witnesses, an effort should be made to embody in the report the impressions which cannot be derived from a mere unaided reading of the record." Att'y. Gen. Comm. Ad. Proc., FTC, Sen. Doc. No. 186, Part 6, 76th Cong., 3rd Sess., 23. And as to the United States Maritime Commission, the Committee similarly stated, "To whatever extent the nature of a particular case made it important that the trial examiner's views should be given especial weight, because of his observation of the witnesses, those views might readily be obtained and could be embodied in the Commission's proposed report." *Id.*, Part 4, 21.

evidence. Where, in the Board's view, the evidence bearing on credibility which the record preserves affords no basis for concluding that the Trial Examiner's inference as to the truthfulness or accuracy of testimony is in error, the Board must generally assume, unless the report on its face discloses the contrary, that the examiner has properly evaluated the demeanor evidence. Acceptance of the examiner's evaluation of demeanor evidence establishes, in such cases, that a preponderance of the evidence supports the examiner's resolution.

But where, in the Board's view, the evidence bearing on credibility which is preserved in the record establishes that the testimony which the examiner credited should have been discredited or *vice versa,* it will not hesitate to reject the examiner's recommendation and substitute its own contrary conclusion.[47] In such instances, the Board's

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[47] It is of course impossible to catalogue the circumstances which the Board deems persuasive in rejecting an examiner's recommendation concerning credibility; each case necessarily stands on its own bottom. The following cases are illustrative. *Security Warehouse and Cold Storage Co.*, 85 NLRB 857, 883-884, enforced, 136 F. 2d 829 (C.A. 9) (The examiner overlooked the testimony of certain witnesses and their corroborative significance; failed to recognize inconsistencies in testimony; and failed to give proper weight to the employer's hostility to the union); *Bahan Textile Machinery Co.*, 43 NLRB 97, 100 (The record afforded no basis for believing A and B, in one respect, when contradicted by X and Y, and for believing the testimony of X and Y, in another respect, when contradicted by A and B); *Bohn Aluminum and Brass Corp.*, 67 NLRB 847, 849 (The Board discredited a witness

rejection of the examiner's credibility recommendation may be based, singly or in combination, upon such factors as, (1) a view of the case sufficiently different from that of the examiner's as to necessitate a rebalance of the evidence bearing on credibility in the light of the changed perspective (*infra*, pp. 61-63); (2) consideration of objective facts preserved by the record which bear on credibility with sufficient strength to overcome any reasonable influence of demeanor evidence (*infra*, p. 61); and (3) the Board's judgment of the particular examiner's capacity (*infra*, pp. 58-60). In cases where the examiner's ultimate inference as to credibility is found unsound, his evaluation of demeanor evidence, upon which, in part, his inference is based, cannot be accepted as reliable or probative. Thereafter, demeanor evidence, as evaluated by the examiner, is out of the case. And since the Board cannot itself determine the affirmative worth that the demeanor evidence may have, it must base its own finding as to credibility upon the objective evidence in the record, unaided by demeanor evidence. That it may properly do this is established by the numerous cases in which Board decisions have been made and sustained by the courts where

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when he deviated from an important aspect of his direct testimony upon cross-examination, and he was otherwise contradicted by both Board and employer witnesses); *Cedartown Yarn Mills*, 76 NLRB 571, 573 (Examiner failed to consider witness' denial of statement attributed to him, and examiner had relied on the absence of a denial in reaching his determination.).

there has been no intermediate report at all by an examiner (*infra*, p. 64 and n. 61).

Neither when the Board accepts nor when it rejects credibility recommendations of an examiner does the propriety of its action in terms of the weight given demeanor evidence become a subject of judicial review. Thus, where the Board adopts the recommendations of an examiner, the question before the court is not whether the Board was correct in finding that the circumstances preserved by the record did not so preponderate against the examiner's resolution as to warrant rejecting his recommendations based in part upon his evaluation of demeanor evidence. Similarly, where the Board reverses the recommendations of an examiner, the question on review is not whether the Board was correct in finding that the circumstances preserved by the record did so preponderate against the examiner's resolution as to warrant its rejection. Such inquiries would involve reweighing of the evidence, a function which, under the substantial evidence rule, courts may not properly perform.

Under the substantial evidence rule, whether the Board has affirmed or reversed recommendations of an examiner, the scope of review remains the same, namely, whether the Board's determination rests upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National*

Labor Relations Board, 305 U. S. 197, 229. In either posture, unless the evidence credited by the Board "carries its own death wound, that is, is incredible and, therefore, cannot in law be credited, and the discredited evidence * * * carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited" (*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 660), the Board's findings as to credibility may not be upset.

Demeanor evidence, as such, is never before the reviewing court, as it is never before the Board. Where the Board has affirmed findings of an examiner as to credibility, demeanor evidence, as evaluated by the examiner, affords support, of course, for the Board's resolution. That support is lacking when the Board has rejected the examiner's recommended resolution of a question of credibility. But this means no more than that, in such a case, the rationality of the Board's resolution of questions as to credibility must be determined from the bare record. The scope of review is then the same as it was in the *Consolidated Edison* case, 305 U. S. at 226-229, *infra*, p. 64, where the Board findings under review were made without the aid of any report by an examiner. Under this test the Board's finding may not be rejected unless, on the evidence bearing on credibility which the record preserves, the testimony credited by the Board could not as a matter of law have been cred-

ited, and testimony discredited by the Board could not, as a matter of law, have been discredited.[48]

Certainly, a trial examiner's preliminary evaluation of demeanor evidence, which the Board has found insufficient to outweigh the objective evidence bearing upon credibility which the record preserves, cannot suffice to inflict a death wound upon testimony which the Board finds credible, or to stamp with irrefutable truth testimony which, in the Board's view, should not be credited. To hold to the contrary would foreclose the Board from resolving questions as to credibility on the basis of the record as a whole wherever an examiner's recommendations were based in part on his evaluation of demeanor evidence, and would be incompatible with the Board's obligation to determine questions of credibility, like all other questions of fact, on the basis of its view of the fair preponderance of the evidence. It follows that, unless accepted and relied upon by the Board, an examiner's evaluation of demeanor evidence plays no part in judicial review of Board findings as to credibility, and that the Board's reversal of

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[48] The Benjamin Report states that part of the reason for "the test of rationality which the substantial evidence rule provides" is the "circumstance that often the quasi-judicial decision is made by one who has not seen the witnesses or heard their testimony and that the decision may, indeed, be contrary to the recommendation of the hearing officer who did hear the testimony." Benjamin, *Administrative Adjudication In The State of New York*, 338-339 (1942).

an examiner's recommendation does not impair the Board's own finding.

Closer inquiry into the bearing of demeanor evidence on the process of administrative adjudication and the role of such evidence on judicial review of findings as to credibility reveals the necessity for this conclusion.

1. The worth of demeanor evidence depends on the competence of the observer. Judgment is required to distinguish between the well-told story of the sophisticated liar and the halting testimony of an honest but timorous witness. No weight attaches to the evaluation of an examiner who would use as a guide, as did one trial judge in instructing a jury, "that 'wiping' one's hands while testifying was 'almost always an indication of lying.'" [49] And an examiner, like any other trier of fact, may be influenced in evaluating testimony by his own irrational "reactions to women, or red-headed women, or spinsters, or to bearded men, or men with squints or nervous mannerisms, or to Catholics, or Masons, or Republicans, or labor leaders, when any such persons testify." [50]

But while such infirmities exist in the use of demeanor evidence, they usually do not manifest themselves on the face of the record so as to be

[49] *Quercia* v. *United States*, 289 U.S. 466, 472. For a criticism of over-reliance on demeanor evidence, see Blume, *Review of Facts In Non-Jury Cases*, 20 J. Am. Jud. Soc. 68, 71-72 (1936).

[50] Frank, *Say It With Music*, 61 Harv. L. Rev. 921, 936 (1948).

correctible as such as they occur. In consequence, as the court below observed, the "weight to be given to another person's conclusion from evidence that has disappeared, depends altogether upon one's confidence in his judicial powers" (R. 163). Since the capacity of examiners is not fungible, the extent of the Board's reliance on the examiner's opportunity to observe the demeanor of the witness, as the court below further explained, "will depend upon what competence the Board ascribes to the examiner in question," and the Board will "have means of informing itself about his work" (R. 163).[51] This is the administrative analogue to this Court's observation in *Maggio* v. *Zeitz*, 333 U.S. 56, 70, namely, that the "Court of Appeals for each circuit also has the advantage of closer familiarity with the capabilities, tendencies, and practices of the referee and District Judge."

Thus the Board may rightly take into account the varying ability of its examiners in judging the value of their recommendations as to demeanor evidence. But on judicial review, this ability factor is unknown to the court, and in the absence of such relevant information as to the examiner's capacity, the court has no means of intelligently

[51] Thus, in making assignments of examiners to hear cases, the agency may take into consideration "the capabilities of the examiners in question." Sellers, *Adjudication By Federal Agencies Under The Administrative Procedure Act*, in The Federal Administrative Procedure Act and The Administrative Agencies, 536 (1947).

reviewing the Board's rejection of the examiner's evaluation.[52] The Board's acceptance or rejection of demeanor evidence is, therefore, necessarily outside the purview of judicial review, for review cannot be exercised in the absence of pertinent data.

Petitioner characterizes this position as subjecting the examiner's "findings" to the "unexpressed whim of the Board" (Br. p. 32). But the nature of the problem requires that "[a]dherence by the administrative tribunal" to a "standard of responsible adjudication must necessarily be left to the good faith of the tribunal."[53] Some reliance must be placed upon integrity in the performance of duty and upon the monitorship of public, congressional and executive scrutiny. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146. And it must be remembered that Congress left to the Board, not to reviewing courts, the responsibility of determining where the preponderance of the evidence lies.

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[52] In the fiscal year ending June 30, 1949, the Board issued formal decisions in 484 unfair labor practice cases, and thereby became familiar with the caliber of the examiners' performance as shown by the records in those cases; but in the same period of time, only fifty cases, distributed among the eleven Courts of Appeals, were subject to judicial review. National Labor Relations Board, 14th Ann. Rep., pp. 1, 110 (1950).

[53] Benjamin, *Administrative Adjudication In The State of New York*, 336 (1942).

2. Demeanor evidence aside, credibility may be evaluated by such sundry "demonstrable factors as the inherent probability or lack of probability of testimony, contradiction of a witness on a material matter by his own contrary statement or by another witness called by the same party; failure to offer, produce on request, or account for the absence of supporting records; and failure to call material witnesses." [54] Thus, demeanor evidence is but one factor in the determination of credibility; and credibility is but one facet in the process of fact-finding. Every element in this complex of factors —inference, weight, circumstance, credibility, undisputed evidence, the rule of law itself [55]—interacts with every other to influence the final fact determination. A change in the emphasis on one item affects the significance of another and requires the reordering of the whole.

To illustrate by reference to the simple situation presented in this case, the Board was of the view that, in reaching his fact conclusions, (1) the examiner was "guided by a standard" of proof "more rigorous" than a "*preponderance* of the evidence" (R. 12, n. 2), and (2) the examiner failed to attach sufficient weight to the ire and animosity which Kende entertained toward Chairman because of his testimony at the representation

[54] *Eastern Coal Corp.*, 79 NLRB 1165, 1166, enforced, 176 F. 2d 131 (C.A. 4).

[55] Frank, *Say It With Music*, 61 Harv. L. Rev. 921, 947-948 (1948).

hearing (R. 13 and n. 4). The attachment of different values to these factors required that other associated elements in the fact equation be rebalanced to achieve a true result. Demeanor evidence is not immune from such rebalance, for like other items of evidence, the value given it depends in significant part on the impact of related data.

As a result, in exercising its fact-finding function in any individual case after receipt of the examiner's report, the Board is necessarily required to consider anew the influence to be allotted demeanor evidence in the light of its own independent and perhaps different appraisal of other evidence. On judicial review, however, if the limits of the substantial evidence rule are to be respected, consideration of this issue is not open to the court. Unlike the Board, the court cannot independently evaluate the significance of the competing evidence, in the light of which the demeanor evidence was discounted, for the court is denied the power to substitute "its judgment on disputed facts for the Board's judgment . . ." [56] The board's assessment of demeanor evidence cannot, therefore, be tested in terms of whether the court would have taken the same view of the competing evidence as did the Board. The remaining course theoretically open to the court would be to inquire whether a rational fact-finder of first instance could have been influ-

[56] *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226.

enced to assess the demeanor evidence differently if he had also made a different evaluation of the competing evidence. A statement of this inquiry discloses its illusory and futile character. The interaction of facts is such that it could hardly ever be said that a material change in one item of evidence could not rationally induce an alteration in the evaluation of another; in this case, it could not be said that had the examiner approached the case with the perspective adopted by the Board, the examiner's evaluation of demeanor would not have altered.[57] In any event, the conceivable benefits of such speculative judicial inquiry would be too meager to justify its pursuit.

3. Judicial review loses none of its corrective value by excluding from its purview the question whether the Board properly discounted the examiner's demeanor recommendation. Intelligent fact-finding, and in consequence intelligent judicial review, can exist without the aid of demeanor evidence. In old equity practice "the usual method of taking testimony had been by deposition;"[58] modern practice retains full utilization of depositions

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[57] Even if it were practically feasible, a remand to the examiner to ascertain his view of demeanor evidence in the light of the Board's differing view of the other evidence would be fruitless, because the lapse of time would have destroyed the freshness of the examiner's observation of demeanor, thus depriving it of much of its value.

[58] Clark and Stone, *Review of Findings of Fact*, 4 U. of Chi. L. Rev. 190, 204 (1937).

and interrogatories in appropriate circumstances;[59] and a reference to a master "may direct him . . . to receive and report evidence only" but to make no findings.[60] In formal administrative adjudication, before the issuance of an intermediate report was made mandatory by the Administrative Procedure Act (*infra*, pp. 69-71), at times facts were found without aid of any examiner recommendations, and the sufficiency of the process was expressly approved. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-351; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 226-229.[61] And Section 5 (c) of the Administrative Procedure Act, in requiring that the "same officers who preside at the reception of evidence . . . shall make the recommended decision or initial decision," ex-

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[59] Fed. R. Civ. Proc., 26-33; *Lacomastic Corp.* v. *Parker*, 54 F. Supp. 138, 141 (D. Md.).

[60] Fed. R. Civ. Proc., 53 (c); *Carpenter, Babson & Fendler* v. *Condor Pictures, Inc.*, 110 F. 2d 317 (C.A. 9); cf., *Kimberly* v. *Arms*, 129 U.S. 512, 523 ("The information which [the master] may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon or disregard in whole or in part, according to its own judgment as to the weight of the evidence.").

[61] See also, *National Labor Relations Board* v. *A. Sartorius & Co., Inc.*, 140 F. 2d 203, 204, 205 (C.A. 2); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. 2d 905, 909 (C.A. 6), certiorari denied, 312 U.S. 689; *National Labor Relations Board* v. *Hearst*, 102 F. 2d 658, 662 (C.A. 9); *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. 2d 16, 18 (C.A. 9).

pressly states "except where such officers become unavailable to the agency." Thus, where the examiner becomes unavailable by virtue of such circumstances as disqualification,[62] resignation,[63] or death,[64] findings may be made without the assistance of demeanor evidence.[65]

In sum, proper emphasis upon the importance of demeanor evidence should not obscure realization that less than its full utilization may at times be necessary in order to give effect to the broader and more meaningful purposes underlying formal administrative adjudication and its judicial review.[66] Unless the tail is to wag the dog, it needs

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[62] *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 971 (C.A. 4), enforcing, 79 NLRB 127-128.

[63] *National Electric Products Corp.*, 80 NLRB 995-996.

[64] *B. F. Goodrich Co.*, 88 NLRB No. 117; *Stocker Mfg. Co.*, 86 NLRB 666.

[65] Observation of the witnesses "is the basis for this insistence that the man who heard the evidence shall write the decision," and the "statute goes as far as it can towards the realization of that goal, but allows for contingencies. . . ." Sellers, *Adjudication by Federal Agencies Under The Administrative Procedure Act*, in The Federal Administrative Procedure Act and The Administrative Agencies, 539 (1947). "The work-a-day world is no place for the perfectionist." *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, 590 (C.A. 2).

[66] Compare 5 Wigmore, Evidence, § 1396 (1940): ". . . the secondary advantage, incidentally obtained for the tribunal by the witness' presence before it—the demeanor evidence—is an advantage to be insisted upon whenever it can be had. No one has doubted that it is highly desirable, if only it is available. But it is merely desirable. Where it cannot be obtained, the requirement ceases."

to be recalled that commitment of fact-finding to the Board is bottomed on considerations other than the advantages in appraising demeanor evidence (*supra*, pp. 39-41), and that finality of Board findings on review rests similarly on considerations other than demeanor evidence (*infra*, pp. 77-81). Demeanor evidence is but part of the process of fact-finding, and it is no exception to the rule that in the scheme of administrative adjudication an examiner's findings are advisory only (*National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C.A. 5)):

> The Board is in no case bound to follow the fact-findings or recommendations of an examiner. Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner. * * * We must assume a conscientious and fair consideration of the evidence by the Board and are bound by all its fact-findings which are supported by substantial evidence, regardless of the opinion of the examiner or ourselves as to the real truth.

Accord: *National Labor Relations Board* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 16-17 (C.A. 8); *National Labor Relations Board* v. *Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 830-831, 834 (C.A. 9); *National Labor Relations Board* v. *Brown Paper Mill Co.*, 133 F. 2d 988, 990 (C.A.

5); *Burk Bros.* v. *National Labor Relations Board*, 117 F. 2d 686, 688 (C.A. 3), certiorari denied, 313 U.S. 588; *Lacomastic Corp.* v. *Parker*, 54 F. Supp. 138, 139-142 (D. Md.). See also, *National Labor Relations Board* v. *A. Sartorius & Co.*, 140 F. 2d 203, 205 (C.A. 2).

D. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT ATTACH FINALITY TO AN EXAMINER'S FINDINGS

This analysis of the relationship of the Board to its examiners is unchanged by the Administrative Procedure Act upon which petitioner relies (Br. pp. 27-29, 34-35). The responsibility for "actual decision" remains with the Board. *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 696 (C.A. 9). On consideration by the Board, "the findings, conclusions, and orders of the examiner" still "are only tentative or interlocutory in nature." *Sisto* v. *Civil Aeronautics Board*, 179 F. 2d 47, 51 (C.A.D.C.). The function of the Board-examiner process continues to be "to insure procedures by which parties may be fully informed of the issues and proposed grounds of decision and be afforded full opportunity to be heard upon these issues and grounds." *Western Union Division* v. *United States*, 87 F. Supp. 324, 334 (D.D.C.) (three-judge court).

A principal purpose of the Administrative Procedure Act is the enhancement of the stature of the hearing officer in order to foster the conditions of responsible adjudication. To give the examiner

an adjudicatory status of independence and dignity within the administrative process, the Act requires his functional separation from the agency's investigative and prosecutory staff, provides him with assured position and means, and seeks to install able examiners.[67] Commensurate with this status, "to assure that the presiding officer will perform a real function rather than serve merely as a notary or policeman,"[68] examiners are authorized, "subject to the published rules of the agency and within its powers, to" (APA, Sec. 7 (b)):

> (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

These are the very responsibilities which Board examiners are presently entrusted to perform (*supra*, pp. 42-44). The effective discharge of these

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[67] APA, Secs. 5 (c), 11; *Wong Yang Sung v. McGrath*, 339 U.S. 33.

[68] S. Rep. No. 752, 79th Cong., 1st Sess., 21; H. Rep. No. 1980, 79th Cong., 2d Sess., 35; both in Sen. Doc. No. 248, 79th Cong., 2d Sess., 207, 269.

functions does not require, however, that the agency be bound, in some degree, to accept the examiner's findings, and the stature of the examiner, which the Administrative Procedure Act seeks to elevate, is not demeaned by the absence of such finality. Though the "findings of the examiner are advisory only," the "function of the examiner is not simply ministerial. The role which he fills is significant. The very essence of a fair hearing may depend on his conduct."[69] There is nothing, therefore, in the general attributes of an examiner's position to support an inference that his findings are more than advisory.

Turning from the examiner's general status to the explicit authority conferred upon him to "make decisions or recommend decisions in conformity with section 8," the examiner's exercise of this authority likewise leaves the agency heads with the prerogative of free decision. Section 8 of the Administrative Procedure Act, as it applies in pertinent part to adjudication, provides that:

(a) Action by subordinates.—In cases in which the agency has not presided at the recep-

[69] Mr. Justice Douglas, with whom Justices Black, Byrnes, and Jackson concurred, dissenting in *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 371, from a holding that the Administrator of the Fair Labor Standards Act was without authority to delegate his subpena power to subordinates. Mr. Justice Douglas' quoted view, however, represents that of the full court, for one of the reasons the majority advanced against delegability was that the logic of the argument would permit the Administrator to delegate his fact-finding function, a result thought unthinkable (315 U.S. at 361).

tion of the evidence, the officer who presided . . . shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. *On appeal from or review of the initial decisions of such officers the agency shall,* except as it may limit the issues upon notice or by rule, *have all the powers which it would have in making the initial decision.* Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision . . . (b) Submittals and decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include

> a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. [Emphasis supplied.]

The Board's present practice is a precise assimilation of the overall procedure thus prescribed (*supra*, pp. 42-45). The central attribute of this procedure is insistence upon an intermediate examiner decision,[70] whether recommended or initial. Until the enactment of the Administrative Procedure Act, an examiner's report was important as a means of affording a litigant "a reasonable opportunity to know the claims of the opposing party and to meet them" (*Morgan* v. *United States*, 304 U.S. 1, 18), but so long as the issues were otherwise "clearly defined," its omission was without significance (304 U.S. at 26; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-351), although the use of an examiner's "tentative report with an opportunity for exceptions and argument thereon" was regarded as the "better practice" (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 228).[71] It is this "better practice" which the Administrative Procedure Act makes manda-

[70] It may, however, be waived. S. Rep. No. 752, 79th Cong., 1st Sess., 23, 43, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 209, 229.

[71] See also *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, 591 (C.A. 2).

tory.' It is the "device" which "must be used to bridge the gap between the officials who hear and those who decide cases." [72] Its use in the decisional process assures "all parties an opportunity to present their views of the law and the facts and be heard thereon prior to the decision of any case." [73]

But the mandatory issuance of an examiner's report does not bind the agency to the findings embodied in it. Whether the examiner makes an initial decision or recommends a decision, and either course may be adopted by the agency as it chooses,[74] the agency retains full revisory authority

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[72] S. Rep. No. 752, 79th Cong., 1st Sess., 24; H. Rep. No. 1980, 79th Cong., 2d Sess., 38; 92 Cong. Rec. 5653; all in Sen. Doc. No. 248, 79th Cong., 2d Sess., 210, 272, 366.

[73] 92 Cong. Rec. 5653, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 367.

[74] S. Rep. No. 752, 79th Cong., 1st Sess., 23, 43; H. Rep. No. 1980, 79th Cong., 2d Sess., 38; both in Sen. Doc. No. 248, 79th Cong., 2d Sess., 209, 229, 272. The option given the agency is explained in the Committee Print, S. 7, 79th Cong., 1st Sess., June 1945, 15, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 32-33:

> The Attorney General's Committee recommended that the officer or officers who presided at the reception of evidence should not merely make recommendations to the agency in which they serve, but should go further and make an initial decision binding upon the parties in the absence of administrative or judicial review *(Final Report,* pp. 50-53). This subsection, however, leaves it to the agency to choose either in the individual case or in all cases whether the officer or officers who heard the evidence shall actually decide the case or merely make a recommended decision for the further consideration of the agency.

over his findings when the case is before it. If the agency retains for itself the authority to make the initial decision and permits the examiner only to recommend a decision, as the Board has consistently done since the enactment of the Administrative Procedure Act,[75] there is no question that the examiner's findings are advisory only. The very concept of a recommendation negatives the idea of compulsion or finality and leaves the subject open for free decision. Thus, since in conformity with the option given it by the Administrative Procedure Act, the Board requires its examiners to recommend decisions only, nothing in that Act lends an aura of finality to examiners' findings or detracts from the authority of the Board to substitute its own without constraint.

The distinction between an examiner's initial decision and recommended decision apparently is that an initial decision will receive agency review only if there is dissatisfaction with it, manifested either by appeal to the agency or by motion of the agency, whereas a recommended decision always contemplates some further consideration by the agency.

[75] National Labor Relations Board, Rules and Regulations, Series 4, effective September 11, 1946, Sec. 203.38 ("... the Trial Examiner shall prepare an Intermediate Report (recommended decision), but the initial decision shall be made by the Board."); *id.*, Series 5, effective August 22, 1947, Sec. 203.45 ("... the trial examiner shall prepare an intermediate report and recommended order, but the initial decision shall be made by the Board."); *id.*, Series 5, as amended August 19, 1948, Sec. 203.45, in 29 CFR § 102.45 (1949) ("... the trial examiner shall prepare an intermediate report and recommended order, but the initial decision shall be made by the Board.").

Even if the examiner makes the initial decision, Section 8 (a) of the Administrative Procedure Act is explicit in its statement that on "appeal from or review of the initial decisions of such officers *the agency shall . . . have all the powers which it would have in making the initial decision*" (emphasis supplied). Thus, in words as clear as language can be, the APA confirms the agency's complete freedom of decision, for had the agency made the initial decision, nothing would have hindered the full exercise of its revisory authority over the examiner's recommended findings.[76]

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[76] Careful comment on this section appears to be uniform in adopting this view. Davis, *Institutional Administrative Decisions*, 48 Col. L. Rev. 173, 188 (1948) (The agency has power to make "a full substitution of judgment on all questions."); Nathanson, *Some Comments On The Administrative Procedure Act*, 41 Ill. L. Rev. 368, 394-396 (1946); Letter of the Attorney General appended to S. Rep. No. 752, 79th Cong., 1st Sess., 43, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 229 (The agency "may make entirely new findings either upon the record or upon new evidence which it takes."); Attorney General's Manual On The Administrative Procedure Act, 83 (1947) ("In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself."). See also, Rep. Att'y Gen. Comm. Ad. Proc., 53 (1941) ("Agency heads should have the authority, when reviewing hearing commissioners' determinations, to affirm, reverse, modify (including the power to make the finding which they deem required by the record), or remand for further hearing.").

In explaining the agency's retention of "all the powers" of decision, the Senate Report stated,[77] as did the House Report in practically identical terms,[78] that this "does not mean that the initial examiners' decisions (or their recommended decisions) are without effect. They become a part of the record in the case.[79] They would be of conse-

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[77] S. Rep. No. 752, 79th Cong., 1st Sess., 24, in Sen. Doc. No. 248, 79th Cong., 2d Sess., 210.

[78] H. Rep. No. 1980, 79th Cong., 2d Sess., 38-39 in Sen. Doc. No. 248, 79th Cong., 2d Sess., 272-273. The House Report added, however, that "In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10 (e) of the bill." If more is involved in this comparison than recognition of a surface resemblance between successive determinations, the description is too "broad" to be apt, for it would assimilate the agency-examiner relationship to that of agency-court, and as the court below observed, "it is safe to say that the words will not bear so much" (R. 6). See especially, Nathanson, *Some Comments On The Administrative Procedure Act*, 41 Ill. L. Rev. 368, 395 (1946). Thus, under no view are the examiner's findings conclusive if supported by substantial evidence; in reviewing the remedy recommended by the examiner, the agency is not limited to "the narrow confines of law" but may enter the "more spacious domain of policy" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194); and on questions of law, the examiner's judgment is not "entitled to great weight" (*Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 681, n. 1).

[79] Until Section 8 (b) of the APA made this requirement explicit, there was a school of thought which deemed the examiner's report to be no part of the formal record of the agency's proceedings. 1 Pike & Fischer Ad. Law (Current Text) § 63a.16; see, *B. & O. R. Co.* v. *United States*, 298 U.S. 349, 370; *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission*, 63 F. 2d 108 (C.A. 2); *Raladam Co.* v. *Federal*

quence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." This explanation is fully consistent with the advisory nature of the examiner's findings. The examiner's demeanor recommendations are "of consequence" in the Board's decisional process (*supra,* pp. 49-51). An examiner's decisions may have "effect" and be "of consequence" without making them a factor on review, for the examiner's competence, experience, and fairness in making his intermediate report may influence the final decision in significant measure. Thus, although a District Judge's treatment of questions of law has no binding quality on appeal, the cogency of his presentation is intrinsically influential. The gloss of the APA is, therefore, consistent with its text in attaching no element of finality to an examiner's report.

E. THE RELATIONSHIP OF AGENCY TO COURT PRECLUDES THE USE OF EXAMINER RECOMMENDATIONS TO DETRACT FROM THE FINALITY ACCORDED FINDINGS OF THE BOARD

We have shown that the relationship of the Board to its examiners requires that an examiner's

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Trade Commission, 42 F. 2d 430, 432 (C.A. 6), affirmed on other grounds, 283 U.S. 643; *Algoma Lumber Co.* v. *Federal Trade Commission,* 56 F. 2d 774 (C.A. 9); *Federal Trade Commission* v. *Hires Turner Glass Co.,* 81 F. 2d 362, 364 (C.A. 3); *Kidder Oil Co.* v. *Federal Trade Commission,* 117 F. 2d 892, 894-895 (C.A. 7). The Board, however, has always included

findings have no more than an advisory function. We now show that the relationship of the Board to reviewing courts equally compels the conclusion that contrary recommendations of an examiner may not be used to detract from the weight accorded findings of the Board.

1. *Judicial Review is Limited In Order To Give Effect To The Board's Judgment Of Facts.* The congressional objective in reposing the fact-finding function in the Board is to secure its experienced and unified judgment in the specialized field committed to its administration (*supra,* pp. 39-41).[80] For this reason, on judicial review, the Board's findings of fact are "conclusive" unless they are outside the bounds of rational entertainment. A difference of opinion does not mean that the prevailing view is unreasonable. Variance between the Board and its examiner has no tendency to establish that the Board's view is irrational. Such variance, therefore, affords no reason, on judicial review, for displacing the administrative judgment.

Indeed, were difference of opinion pertinent to show unreasonableness, disagreement among Board

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the intermediate report as part of the record in the case. National Labor Relations Board, Rules and Regulations, Series 1, September 14, 1935, Sec. 31.

[80] See also, Stern, *Review of Findings of Administrators, Judges and Juries,* 58 Harv. L. Rev. 70, 99-109 (1944); *Cox, Judge Learned Hand And The Interpretation of Statutes,* 60 Harv. L. Rev. 370, 391, n. 58 (1947).

members themselves, even more than disagreement between the Board and its examiner, would tend to diminish the weight to be accorded the majority action. Yet it is settled that, where dissent exists, the "legal effect of the challenged report and order is the same as if supported by all members" of the agency. *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 362.[81] The "Board acts as a unit, and a dissent no more reduces the legal effect of its findings and order than does a dissenting opinion of a member of a court detract from the legal effect of the court's judgment." *Sperry Gyroscope Company, Inc.* v. *National Labor Relations Board*, 129 F. 2d 922, 924 (C. A. 2).[82] Difference of opinion therefore cannot of itself detract from the substantiality of the evidence supporting the Board's findings. Indeed, where division exists, promotion of the congressional policy of entrusting fact-finding to the Board is enhanced by resolving doubts in favor of the Board's judgment.

2. *To Detract From The Substantiality Of The Board's Findings Because Of Difference With The Examiner Would Make The Standard Of Judicial Review Too Indefinite.* In its petition for

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[81] See also *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 492-493.

[82] See also, *National Labor Relations Board* v. *Sartorius*, 140 F. 2d 203, 205-206 (C.A. 2); *National Labor Relations Board* v. *Leviton Mfg Co.*, 111 F. 2d 619, 621 (C.A. 2); *Doyle Transfer Co.* v. *United States*, 45 F. Supp. 691, 695 (D. D. C.) (three-judge court).

certiorari (p. 14), petitioner conceded that the position of an examiner in administrative proceedings is not assimilated to that of a master in federal practice so as to make the examiner's findings of fact final unless clearly erroneous. In its brief, however, petitioner now contends "that the examiner should assume the same relationship to the Board as does a master *vis a vis* a court" (Br., p. 34). Petitioner's initial concession was nevertheless a necessary one.

The finality which attaches to a master's findings "unless clearly erroneous" (Fed. R. Civ. Proc., 53 (e) (2)), and as to a District Judge's findings (Fed. R. Civ. Proc., 52 (a)), extends to all elements of the fact equation, including weight, inference, and credibility.[83] It is safe to say that under no view is such enforced impotency placed on an agency in its relationship to its examiner. Moreover, the reference to a master may direct him "to receive and report evidence only," but to make no findings (*supra*, p. 64), thus enabling the District Judge to control the master's role in terms of his ability and the intricacy of the case. No such power would inhere in the Board, thus disabling it, beyond even what the Federal Rules of Civil

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[83] *Anderson* v. *Clemens Pottery Co.*, 328 U.S. 680, 689; *Walling* v. *General Industries Co.*, 330 U.S. 545, 550; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394; Note to Rule 52, Fed. R. Civ. Proc.

Procedure would require, from accommodating to the circumstances of particular litigation.

Petitioner's initial position (Pet. for Cert., p. 14), to which it now adheres as an alternative ground (Br., pp. 34-35), is that "the absence of a precise standard defining the weight to be given examiner's findings does not justify disregarding them altogether," and proposes that on judicial review "it is possible to ascribe some weight to the fact that the Board reversed a trial examiner without precisely defining the exact weight to be given." In rejecting this contention, the court below explained that it "was unable to apply so impalpable a standard;" that "it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal a factor in the court's decision;" and that it could find no "middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity" (R. 162-163).

Such a forceful judicial expression of infeasibility, by a court experienced in factual review and notably alert both to its own capacity and to administrative needs, is entitled to great respect. Moreover the indefiniteness of so immeasurable a criterion as "some weight" emphasizes the danger of its unconscious use as means of substituting judicial for administrative judgment. When it is recalled that the "effectiveness" of even an articu-

lated standard of review "will depend largely upon the attitude with which the case is approached" [84] the risk cannot be dismissed as fanciful. Finally, to ascribe some detractive weight to the Board's reversal of an examiner's findings would create two standards of judicial review, one to be applied to the concurrent findings of Board and examiner, and a more rigorous one to be applied where division exists (*supra*, p. 30). But Congress established only one standard of review, the substantial evidence rule and that was to be applied *to the Board's* findings.

In sum, the contention that an indefinite element of finality attaches to an examiner's findings which, upon reversal, detracts from the substantiality of the Board's substituted findings, rests upon no more than an uncritical analogy between the examiner and agency relationship, on the one hand, and the trial and appellate court relationship, on the other. It repeats, therefore, the error of failing to observe "vital differentiations between the functions of judicial and administrative tribunals," and, in consequence, it reads "the laws of Congress through the distorting lenses of inapplicable legal doctrine." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144; see also, *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 227.

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[84] *Dobson* v. *Commissioner of Internal Revenue*, 320 U.S. 489, 501.

III. Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That Chairman Was Discharged Because He Gave Testimony

Substantial evidence on the record considered as a whole supports the Board's finding that Chairman was discharged because he gave testimony at a Board hearing. The subsidiary elements of this finding are: (1) By testifying at a Board representation hearing on November 30, 1943, in opposition to the stand taken by petitioner, Chairman aroused the strong animosity of Chief Engineer Kende, who desired to discharge him because of the adverse evidence he gave; (2) Kende promptly investigated Chairman's employment history, in an effort to unearth a basis for discharge; because he could not find support for the immediate reasons which suggested themselves, inefficiency and Communist affiliation, he did not then dismiss Chairman, but his desire and intention to uncover a pretext warranting discharge continued unabated; (3) on January 24, 1944, eight weeks later, Kende summarily discharged Chairman, utilizing as his pretext an incident of asserted insubordination which had occurred three and one-half weeks before on December 30, 1943. In this view of the facts the discharge violated Section 8 (1) and (4) of the Act whether or not in belatedly bringing the incident to Kende's attention Weintraub was motivated in part or in whole by his knowledge of Kende's desire to find some pretext which would enable him to dismiss

Chairman. The crucial question is whether Kende's animus against Chairman because of his testimony played a part in Kende's decision to discharge him. The Board's conclusion that it did, as the court below held, is a rational appraisal of the evidence.

As explained by the Court of Appeals for the Fourth Circuit in stating the settled rule pertaining to the adjudication of discriminatory discharges, "It must be remembered, in this connection, that the question involved is a pure question of fact; that in passing upon it, the Board may give consideration to circumstantial evidence as well as to that which is direct; that direct evidence of a purpose to violate the statute is rarely obtainable; and that where the finding of the Board is supported by the circumstances from which the conclusion of discriminatory discharge may legitimately be drawn, it is binding upon the Courts, as they are without power to find facts, or to substitute their judgment for that of the Board."[84a] In applying this rule, and holding that the Board's conclusion was "within the bounds of rational entertainment," the court below cut to the nub of this case insofar as judicial review is concerned in stating (R. 165):

> When all is said, Kende had been greatly outraged at Chairman's testimony; he then did

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[84a] Parker, C. J., in *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. 2d 291, 293 (C.A. 4).

> propose to get him out of the factory; he still thought at the hearing that he was unfit to remain; and he had told Weintraub to keep watch on him. We cannot say that, with all these circumstances before him, no reasonable person could have concluded that Chairman's testimony was one of the causes of his discharge, little as it would have convinced us, were we free to pass upon the evidence in the first instance.

In this Court, by analogy to the two-court rule, judicially approved agency findings are rarely to be disturbed.[84b] Accordingly, the Board's finding that Chairman was discharged because he gave testimony should be affirmed as supported by substantial evidence on the record considered as a whole.

Contrary to petitioner's contention (Br. pp. 35-46), the Board carefully considered all of the items of evidence in the record in reaching its decision, it carefully stated the reasons for its inability to accept those findings of the examiner which it rejected and it did not substitute "expertness for evidence,"[85] see *infra*, p. 87, note 87. The fact that

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[84b] See *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453, 461; *International Association of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 75; *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 357.

[85] Petitioner's contention, based on the legislative history of the amended Act, that Congress intended to preclude the Board from substituting "expertness for evidence", cannot serve to deprive the Board of its power and duty to assess the significance of evidence and to draw inferences therefrom in the light of the Board members' knowledge of industrial con-

the Board, like any other fact finder, was required to and did draw inferences as to intent from the evidence does not mean, as petitioner seems to assume, that the Board's findings were not grounded in the evidence. We turn now to the subsidiary findings and the evidence.

The Board's basic subsidiary findings rest in large measure upon admissions by petitioner itself; when Chairman's testimony was relied upon, it was corroborated by credible evidence.

A. *The Factors Showing the Discriminatory Purpose.* When petitioner's officials were apprised by Chairman's presence at the first session of the representation hearing that he would testify in opposition to their stand, they at once sought to dissuade him, warning him that by testifying he would jeopardize his position with the Company.[86]

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ditions and labor relations. Cf. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 800, and Brief for the National Labor Relations Board in opposition in *La-Salle Steel Co.* v. *National Labor Relations Board*, No. 701, October Term, 1949, pp. 18-21, certiorari denied, 339 U.S. 963. Expertness cannot substitute for evidence; what it can and must do is to reveal the meaning and significance of evidence which would be lost upon one inexperienced in the field. It was primarily to secure the advantage of such assessment that the Board, an administrative agency, was created by Congress to adjudicate unfair labor practice cases, see pp. 39-41, *supra*.

[86] Petitioner contends (Br., pp. 35-38) that the Company had no adverse interest in the representation case and that its motive for opposing Chairman's appearance as a witness and its hostility to him for testifying is therefore without rational explanation. But petitioner's counsel admitted at

When Chairman disregarded these warnings and testified in opposition to the Company's stand, Kende, as petitioner's counsel admitted at the hearing, became "incensed" (Tr. 532). After admittedly denouncing Chairman for having "perjured himself" (R. 64, *supra*, p. 7), Kende (R. 65), promptly undertook to discover an excuse for discharging him (*supra*, p. 7). Contrary to Kende's hopes, Politzer reported that Chairman's work was satisfactory, and Kende fared no better when he tried to fasten the label of Communist on Chairman. However, he did not drop the project of getting rid of Chairman. Still "very angry" with Chairman (Tr. 1010-1011, cf. Tr. 532), Kende instructed Politzer "to keep an eye on the man's work" (R. 66). It was no secret that, as Politzer and Goldson told Chairman, "on account of [your] going down to give testimony [the Company is] after [your] scalp" (R. 47, *supra*, p. 9).

The evidence thus unmistakably establishes Kende's hostility to Chairman, aroused by his testimony, and the purpose to discharge him because of it. Kende's purpose was known both to Wein-

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the hearing that "the Company would have preferred that no new union be introduced into the picture" (Tr. 526). See also the decision of the Board in *Universal Camera Corporation*, 54 NLRB 1037. The testimony of Chairman, the only supervisor who appeared in support of the A.F.L., at the representation hearing, was obviously regarded by the Company as contrary to its interests. As Politzer admitted at the hearing (Tr. 1010-1011), Kende was "very angry with [Chairman] *for having to fight him.*" (Italics added.)

traub and to Politzer. Only an appropriate excuse, to hide the real reason, was then missing. As the Board found (R. 14), Kende's animus against Chairman for testifying did not abate, and his plan "to find a pretext for discharging him," was "not shown to have been abandoned." Indeed, the testimony of Kende himself shows that that plan was continued in operation, for, at the conference, Kende admittedly instructed Politzer to keep watch on Chairman (Tr. 565-566).[87] In these circumstances, the Board was reasonable in viewing the alleged basis for discharge with skepticism (cf. *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 230-231), and in requiring petitioner to overcome the heavy onus with which its attitude had burdened it. As the Board said (R. 13):

> In the face of this clear evidence of the [petitioner's] animus against Chairman and its desire and intention to discharge him because of his testimony at the Board hearing if a pretext could be found, it was incumbent upon the [petitioner] to go forward to show convincingly that when Chairman was actually dis-

[87] Under these circumstances, the Board was impelled to reject the Trial Examiner's appraisal that the conference of December 1st between Kende, Weintraub and Politzer did not result in "any plan for Chairman's discharge." Contrary to petitioner's assertion (Br., pp. 36, 40, 42-43) the Board adequately explained its reasons for rejecting the Examiner's conclusion by stating (R. 13, n. 4), "the Trial Examiner discounts the significance of the conference and Kende's motivation as revealed by it."

charged—by Kende himself—8 weeks later, ostensibly because of an episode that was then stale, the real reason was something other than Chairman's appearance as a witness.

We shall now show that it was rational to conclude that petitioner did not overcome the Board's *prima facie* case. Cf. *Montgomery Ward & Co., Inc.* v. *National Labor Relations Board,* 107 F. 2d 555, 560 (C. A. 7); *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. 2d 862, 872 (C. A. 2), certiorari denied, 304 U. S. 576.

B. *The Incident Of Asserted "Gross Insubordination"* [88] *Utilized to Discharge Chairman.* On the night of December 30, 1943, when Weintraub demanded that Chairman discharge Kollisch, Chairman explained that he had directed Kollisch to stand by for emergency service. When Weintraub nevertheless persisted in his demand, Chairman, noting that he needed Kollisch's services that night, referred Weintraub to Plant Engineer Politzer because the latter was Chairman's "superior" (R. 48). Weintraub's intemperate retort, (R. 28; 48, 69, *supra,* p. 10) drew from Chairman as mild a response as could have been expected.[89] After Weintraub ordered Chairman to leave the plant, Zicarelli, a union shop steward, intervened and induced Chairman and Weintraub to

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[88] Petitioner's Answer before the Board.

[89] See p. 92, *infra.*

shake hands and forget the quarrel.[90] Chairman then finished his shift without further incident. (*Supra*, pp. 9-10.)[91]

In the Board's view, two factors combine to show that this incident was not the "real reason"[92] for Chairman's ultimate discharge on January 24, 1944: (1) Kende's action in ruling "peremptorily in Weintraub's favor, without questioning Chairman himself, or otherwise investigating the December 30 incident," "despite Politzer's opposition," although by the time Kende heard of it the incident was "stale" (R. 13, 14); and despite the fact that the incident was not, as the Company claimed, "an instance of 'gross insubordination' on Chairman's part," but "was, at most, only a squabble between two supervisors, one of whom, Chairman reasonably questioned the other's authority in the circumstances" (R. 13); (2) Weintraub's unexplained delay for three and one-half weeks in bringing the incident to Kende's attention, during which period Chairman was "neither reprimanded . . . for his supposed impertinence" nor was "any disciplinary action" taken "against him" (R. 13-14).

[90] Weintraub said (R. 49), "Well, I acted kind of harsh and I shouldn't have done that, so let us forget it."

[91] This version of the incident is based on the testimony of Chairman and Zicarelli which the Trial Examiner and the Board credited. Weintraub gave an entirely different version of the incident (R. 14, n. 6, 27-29).

[92] *National Labor Relations Board* v. *Electric City Dyeing Co.*, 178 F. 2d 980, 982 (C. A. 3).

1. *Kende's motive:* The Board was reasonable in concluding that but for Kende's animosity toward Chairman and his desire to find a pretext for discharging him because of his testimony, Kende would not have reacted to the incident by summarily discharging Chairman. This is true whether or not Weintraub was influenced by his knowledge of Kende's animus toward Chairman in reviving the December 30 incident when he did. Testing the stated reason for the discharge in terms of the result it would normally produce, it is unlikely that a reasonable employer in Chief Engineer Kende's position would have reacted to the quarrel by discharging Chairman, were he not actuated by a discriminatory purpose.

a. Weintraub's quarrel with Chairman was precipitated by a dispute as to whether Weintraub was authorized to order Chairman to discharge a rank-and-file employee. The managerial hierarchy in the plant ascended from Chairman to Plant Engineer Politzer, who in turn was responsible to Chief Engineer Kende, who in his turn, was answerable to Vice President Shapiro (R. 65, 69-70). As personnel manager, Weintraub did not normally give orders to employees, who, after being hired, were assigned to the mechanical engineering phase of the plant work which came under Kende's "supreme supervision" *(ibid.)*. Neither Kende nor anyone else ever authorized Weintraub to discipline Politzer, nor did Kende "ever designate

. . . Weintraub to discipline men directly responsible to . . . Politzer" (R. 70). Furthermore, at the time of Chairman's discharge Politzer himself firmly understood that Weintraub had no authority over Chairman. He testified revealingly that when Kende sided with Weintraub, he was "mad at Mr. Weintraub's going over my head and Mr. Kende having backed Weintraub up" (R. 86). He felt then that Weintraub's action was "interference in my department" and that in defending Chairman, "I was really going to bat for myself. I felt that Weintraub was lowering me in my own eyes by giving my men orders" (R. 88, 89). Politzer also said that he knew that those in his department understood that he was their superior (R. 88), and respondent does not even claim to have made known any authority on Weintraub's part over Politzer's subordinates.

Thus, as the Board found, when Chairman declined to follow Weintraub's order, Chairman "reasonably questioned the other's authority in the circumstances" (R. 13). Consequently, although Kende ruled that "Weintraub was specifically designated to supervise order and general discipline in the plant" and "he was within his authority to act as he did" (R. 69), the lines of authority in the plant were sufficiently obscure so as to afford no reasonable occasion for discharge on that account. Since this "squabble between two supervisors" (R. 13), in which Weintraub par-

ticipated without credit to himself, called for clarification of authority, not dismissal, it is unlikely that in the absence of another motive, a reasonable employer in Kende's position would have acted as Kende did.

b. Whether or not Weintraub was drunk on the night of his quarrel with Chairman, his words and actions were not those of a temperate person, for no sensible individual, even if his authority is defied, tells another: "I have such powers from the War Department that if I want to—'I can slap a man,' 'I can kill a man if I want to' " (*supra,* p. 10).[93] Chairman's response "If you are drunk, please go home and sleep it off" (*supra,* p. 10), was thus not without warrant. With the provocation for it in mind, it is unlikely that a reasonable employer in Kende's position would take seriously Weintraub's complaint that failure to discharge Chairman for calling him "drunk would lower his prestige in the eyes of the" personnel (R. 84). It is of the utmost significance in evaluating Kende's reaction that, in similar circumstances, where Chairman had responded to Kende's charge of perjury by commenting "if you call me a liar you are a liar," Kende did not regard Chairman's response as one warranting any disciplinary action whatever, despite the fact that Kende was then searching for a pretext which would warrant Chairman's

[93] Weintraub did not specifically deny making these statements to Chairman. Zicarelli corroborated Chairman's testimony on this point (R. 60).

discharge. In testifying at the hearing concerning the factors which made him angry with Chairman, Kende did not even mention Chairman's counter-accusation that Kende had lied (Tr. 548, 561, 566). It is clear, therefore, that normally, absent a discriminatory motive, Kende would have evaluated Chairman's imputation of drunkenness to Weintraub in the light of the provocation therefor, and as a result, would not have discharged him.

Even assuming that the provocation would not have served to absolve Chairman entirely, it would certainly have served to make the extreme penalty of discharge inappropriate. Thus, even Politzer who, at the time of the hearing, was a strong partisan of the Company's position, stated (Tr. 1120), that now "I can see [Weintraub's] point that anyone questioning his authority and *getting away without some sort of reprimand* would make it harder for [Weintraub] to perform his duties" (italics added).

c. Kende apparently first heard of the December 30 incident on January 24, after three and a half weeks had elapsed and the incident was already stale. For a responsible official like Kende to order the discharge of an employee because of an incident which, though known to the supervisory staff for so long a time, had not theretofore been called to his attention, is not natural.[94] Apparently

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[94] The usual industrial understanding pertaining to the remission of stale plant offenses has been lucidly stated by

Kende himself realized the arbitrariness of his conduct, for at the hearing he sought to make it appear that it was not he, but Weintraub who discharged Chairman on the 24th, and indeed that "Whether Chairman was thereafter fired or whether he left on his own steam, I actually did not know and did not inquire into. I became aware two or three days later that he was no longer with us because Politzer came to my office in connection with a question of replacing him." (Tr. 663).

d. Kende ordered Chairman's discharge without affording him an opportunity to explain his position and without otherwise investigating the matter. Kende's "summary ruling" (R. 14) is not the action of a reasonable employer. To discharge an employee, particularly a supervisor, "summarily, without preliminary warning, admo-

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Professor Harry Schulman while acting as permanent arbitrator under the Ford-UAW (CIO) collective bargaining agreement (*Ford Motor Co.*, Opinion A-156, 1944, in Schulman and Chamberlain, *Cases On Labor Relations*, 51 (1949)):

> But it is true that disciplinary action, if taken, must be taken fairly closely after the commission of the offense. Not all shop offenses are made the occasion for disciplinary penalties; many are, for one reason or another, permitted to die without consequence. If an offense is not followed by disciplinary action fairly promptly, it becomes part of the great past, an incident to be recalled as a missed opportunity or a lucky break. It cannot later be revived as the occasion for current disciplinary action.

nition or opportunity to change the act or practice complained of . . . is not natural." [95]

e. Kende ordered Chairman's discharge despite the fact that he was conscious of the "great shortage" of engineers (R. 71) and of the fact that the Company had had a "great deal of difficulty filling that position in the past" (R. 86). Indeed, after Chairman's discharge, Kende himself pointed out to Politzer that it would be impossible to replace him with a person of comparable skill (R. 71, 86). Normally, Kende, as Chief Engineer, would not have suffered the loss of an efficient engineer in circumstances where, as here, an alternative to his discharge was feasible.

Accordingly, since Kende's discharge of Chairman deviated markedly from the action to be expected of a reasonable employer uninfluenced by a discriminatory motive, it was rational for the Board to conclude that but for the "extreme animus" (R. 14) aroused by his testimony at a Board hearing Chairman would not have been dismissed. This is all the more reasonable since the representation case in which Chairman adversely testified was still undecided at the time of his discharge and therefore still fresh in Kende's mind by virtue

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[95] *E. Anthony & Sons* v. *National Labor Relations Board*, 163 F. 2d 22, 26 (C. A. D. C.), certiorari denied, 332 U. S. 773.

of its pendency.[96] Indeed, in its brief before the court below petitioner itself recognized that the merits of the December 30 incident, and Weintraub's request that Chairman be dismissed because of it, could not adequately explain Kende's decision to discharge Chairman. Petitioner there stated, Kende's "own estimate of Chairman's personality *naturally* entered into his decision to support Weintraub" (Br. 19). Under these circumstances the reasonableness of the Board's finding that what actually influenced Kende's decision was his animus against Chairman for testifying is beyond dispute.

2. *Weintraub's unexplained delay.* Petitioner explains Weintraub's delay in bringing the incident to Kende's attention in the following fashion: The second work day after the incident of asserted "insubordination," Personnel Manager Weintraub pursued his desire for Chairman's discharge with Plant Engineer Politzer, and Politzer assured Weintraub that Chairman had stated he would resign shortly; willing to await Chairman's voluntary resignation, Weintraub did not further press the matter until about three weeks later when he "noticed" (R. 77) that Chairman was still in the plant;[97] again taking up the matter of Chairman's

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[96] The representation case was decided on February 2, 1944, nine days after Chairman's discharge. *Universal Camera Corp.*, 54 NLRB 1037.

[97] Indicating the unreliability which permeates the testimony of petitioner's officials, in contrast to Weintraub's

discharge with Politzer, Weintraub insisted upon his dismissal, and upon Politzer's refusal, the two presented the question to Chief Engineer Kende who ordered Chairman's discharge. The Board's rejection of this version of events as a fabrication was rational.

According to both Chairman and Politzer, Chairman reported to work as usual the first work day after Weintraub's wrangle with him. He told Politzer of the incident, including a statement that Weintraub had been drunk, and asked whether Weintraub had authority to give him orders. Politzer did not reprimand or discipline Chairman; on the contrary, he stated that Weintraub was not his boss and that Weintraub was "out of order" in seeking to assert authority over Chairman. Politzer added that he would see to it that Weintraub kept his promise to forget the matter. (*Supra*, pp. 10-11.)

The critical question arises from the fact that Politzer claimed that a day or two later Chairman told Politzer that he would resign and Politzer relayed this information to Weintraub. Chairman denied ever telling Politzer that he would resign and the trial examiner, rejecting Politzer's testimony, credited Chairman's denial. The trial

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statement that he "noticed Mr. Chairman on the floor" (R. 7), Kende testified that Weintraub told him he "realized" that Chairman "had still not resigned" "since he had the personnel records of resignations, terminations, and so forth" (R. 69).

examiner found nevertheless that Politzer told Weintraub that Chairman would resign. To credit this portion of Politzer's testimony required the examiner to infer, as he did, that in making this report to Weintraub Politzer was either mistaken or had lied. But the Board believed that Politzer never told Weintraub that Chairman would resign and that in testifying to the contrary, as in testifying that Chairman allegedly told him he would resign, Politzer was lying.[98]

This resolution is supported by the fact that in testifying as to those events which "lay exclusively within" their "own knowledge,"[99] petitioner's officials were in sharp conflict with one another, and as to those events in which independent evi-

[98] In estimating Politzer's veracity it should be borne in mind that an excellent reason existed for the disparity between his testimony and the events which actually occurred. As the examiner pointed out, during the period of Chairman's employment "Politzer was friendly with Chairman and did try to help him" (R. 27, n. 7). Politzer then "felt resentment against the Company because he was not consulted by top management concerning the men under his supervision" (R. 27, n. 7; Tr. 953-954, 974, 998-1000, 1012-1013, 1019, 1034-1035, 1044, 1117-1118). But prior to the unfair labor practice hearing, Politzer "reconsidered his position and felt that he had been wrong in his attitude towards the Company" during the period pertaining to Chairman's discharge (*ibid.*). After Chairman's discharge Politzer may have feared that if he testified against the Company his own position would be in jeopardy. See note 102, p. 105, *infra*.

[99] *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. A. 2), certiorari denied, 304 U. S. 576.

dence was available, that evidence was incompatible with their version.

Politzer's testimony. Politzer testified that the second work day after the incident, he encountered Weintraub in the corridor outside his office, and Weintraub stated, "I hear you have been investigating me as to whether I was drunk or not" (R. 83). After Politzer answered "Yes," Weintraub denied that he had been drinking, and added, "I was going to forget this whole matter with Imre but since he is raising the issue of drunkenness, I want him fired. I argued with" Weintraub, but Weintraub "wouldn't listen," and the two parted (R. 84). Later in the day, on seeing Chairman, Politzer "told him that Weintraub was insisting that he be fired," and Chairman, "kind of blue," said, "The men in the shop wouldn't back me up. I am going to quit. I will give you my written resignation and I will quit in about ten days." (R. 84.) Thereupon, Politzer telephoned this information to Weintraub who stated, "if that is the way he wants it, I will play ball with him" (*ibid.*).

Weintraub's testimony. In marked divergence from Politzer's testimony, Weintraub testified only that on seeing Politzer the "very next day after the incident" (R. 79), "before I could even go into it," Politzer told him "that he knows all about it" and "that Chairman had resigned and was going to leave within ten days to two weeks"

(R. 80). Weintraub stated, "Fine. I will let it ride until he leaves" (R. 80).[100]

There is thus no agreement between the testimony of Politzer and Weintraub, both company officials, except as to one item, critical to petitioner's explanation for the delay, namely, that Politzer told Weintraub that Chairman would resign shortly. But whether to accept this isolated segment of testimony as truthful may fairly be tested in relation to the reliability of the other intertwined testimony of the same witnesses. The "facts disputed in litigation are not random unknowns in isolated equations—they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 337 U.S. 656, 659.

So appraised, the testimony of Politzer and Weintraub, both testifying for the same party and

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[100] In further explanation of his agreement to wait for Chairman's resignation Weintraub testified (Tr. 922) "my pride isn't that important that I couldn't get Mr. Politzer to take the time he needed properly—to have somebody else put in his place." It is significant in evaluating Weintraub's testimony, that even after Chairman's discharge the Company made no effort to obtain an outside replacement, on the ground that no competent engineers could be found (Tr. 1000-1001). Yet, this factor did not deter Weintraub from pressing for Chairman's discharge.

with the same interest, manifests such contradiction and inherent improbability as to warrant rejection in whole. Politzer places his conversation with Weintraub two working days after the incident with Chairman; Weintraub states it occurred the "very next day after the incident." Politzer describes a lengthy personal meeting with Weintraub and a later telephone conversation; Weintraub tells of single brief personal encounter. Politzer relates a full discussion with Weintraub, beginning with Weintraub's protest against the investigation of his reported intoxication, his willingness "to forget the whole matter" until he found that Chairman was "raising the issue of drunkenness," his consequent insistence that he be "fired," a futile effort to dissuade him, and a later telephoned report that Chairman would resign; negating practically all of Politzer's account, Weintraub states merely that "before" he "could even go into" the matter of his quarrel with Chairman, Politzer told him without more that Chairman would resign, and the conversation ended.

Leaving the contradictions between Politzer and Weintraub, we turn to the inherent improbability of Politzer's account of his conversation with Chairman. Politzer states that Chairman, "kind of blue," told him, "The men in the shop wouldn't back me up. I am going to quit. I will give you my written resignation and I will quit in about ten days." At the time of Chairman's asserted

statement that the "men in the shop wouldn't back me up" there was no probable basis for its utterance. It was only recently that Chairman had materially helped the men in their quest for union representation; his encounter with Weintraub stemmed from his refusal to discharge a rank-and-file employee; and upon the occasion of Chairman's ultimate discharge, but for his intervention, the men might have struck in his support, and the union steward did speak to the management on his behalf (R. 52). And it is even more unlikely that Chairman offered to resign. In keeping with his independence of spirit, which he exhibited in testifying at the representation hearing despite warnings from Politzer and Goldson and also in refusing to submit passively to Chief Engineer Kende's censure of his testimony (R. 45, 58, 64), it was highly improbable to suppose that Chairman would resign as a consequence of a dispute in which he felt he was in the right. Indeed, on January 11 or 12, 1944, about two weeks after his asserted offer to resign, when Politzer did in fact ask Chairman to "consider" resigning, according to Chairman's uncontradicted testimony, he emphatically refused, stating, "I know that they want to do something because I helped the men and testified for them . . . I never quit under fire and I will see it through to the end" (R. 14, 31; 51). Furthermore, although Politzer promptly sought a replacement for Chairman when the latter was actually discharged on January 24 (R. 86-87, 71),

there is no showing that Politzer took any steps to obtain a replacement for Chairman after the latter purportedly stated he was leaving. It is plain, therefore, as Chairman testified (R. 51), and as both the Board and the examiner found (R. 30-31), that Chairman never stated he would resign.

Thus, because the testimony with which it is intimately interlaced is extremely questionable, it is rational to conclude that Politzer did not tell Weintraub that Chairman would resign. The examiner's contrary conclusion was based upon the admitted fact that on January 11 or 12, Politzer asked Chairman whether he would consider resigning (R. 31; 164; 51).[101] The examiner's conclusion was therefore not based upon the demeanor

[101] The court below also thought this fact supported the examiner's conclusion (R. 164). On the other hand, however, this view is opposed by the credited testimony of union shop steward Zicarelli that Weintraub told him the day after the quarrel that the incident "is forgotten" (R. 14, n. 6, 63). Moreover, suggestions to Chairman from management officials that he resign had evidently been bruited about from the very time of his testimony at the representation hearing. A few days after the representation hearing, Goldson, a supervisor with status equal to Chairman's had told Chairman: "Imre, you better watch out. If you have anything which is not all right with you, *you better resign* and don't fight them because otherwise, you know that Kende has all the reports in, and your application blank, and they want to see if they can get rid of you" (R. 47, *supra*, p. 9, n. 10, emphasis supplied). On January 11, Politzer, in effect, indicated to Chairman that Weintraub wanted him to resign. It may well be that this suggestion to resign was but Weintraub's attempt to ease

of Politzer, but upon objective facts which the record preserved and the significance of which the Board was free to evaluate *de novo*.

The propriety of the Board's reversal of the examiner on this point is illustrated by the fact that to support his conclusion that Politzer did tell Weintraub that Chairman would resign the examiner was forced to indulge in surmise as to why Politzer would make a concededly false report to Weintraub. The examiner thought the explanation might be either that Politzer made an "honest mistake" in his report to Weintraub or that he may have been motivated "by the thought that the quarrel between Weintraub and Chairman might be soon forgotten if action was delayed" (R. 33). But the Board could rationally conclude that this surmise was without support. Every reason which makes it unlikely that Chairman would offer to resign makes it equally unlikely that Politzer, knowing Chairman as he did, could have imputed such a purpose to Chairman as an "honest mistake." Nor is it likely that Politzer would have made the statement in order to appease Weintraub. Politzer's testimony indicates that at that time he was in no mood for appeasement. He was very angry at what he considered Weintraub's inter-

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Chairman out of his job without the necessity of bringing the December 30 incident and Weintraub's part in it to Kende's attention. These competing considerations simply highlight the principle that the job of piecing together conflicting items of evidence into a harmonious mosaic is for the Board.

ference in matters not his concern (R. 87, 88), and as he stated, "I was really going to bat for myself. I felt Weintraub was lowering me in my own eyes by giving my men orders" (R. 89). Appeasing Weintraub at that time would have been furthest from Politzer's mind; indeed, if there was any discussion of the incident at all, Politzer would most likely have made an issue of the question of Weintraub's authority, as he did on January 24 (R. 84). Moreover, to assume that Politzer was appeasing Weintraub requires the conclusion that he was deliberately lying on the witness stand, for if appeasement was his motive, he could have so testified, instead of telling the story he did. Every view of the facts, therefore, impels the conclusion that Politzer at no time told Weintraub that Chairman would resign.[102]

Thus, contrary to the impression of the court below (R. 163), the examiner's conclusion that Politzer told Weintraub that Chairman would resign did not rest upon his evaluation of demeanor evidence, but upon his assumption that Wein-

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[102] That Politzer, at the time of the hearing, was willing to fabricate when he believed fabrication would help petitioner's case is apparent from his attempt to convey the impression that at the conference on December 1, in Kende's office, he *volunteered* to "check into [Chairman's] work further" (Tr. 969, 1064-1065), thereby absolving Kende of having instructed him to do so, which was one of the most damaging features of the case against petitioner. Compare Kende's admission (R. 66) that it was in fact he who instructed Politzer to keep watch on Chairman.

traub's delay must be explained and that only such a report as Politzer purportedly made to Weintraub would explain it. It was this assumption which required him to indulge in surmise as to why Politzer would make a concededly false report to Weintraub—a surmise unsupported even by Politzer's testimony. Moreover, even if the examiner had relied on demeanor evidence, it requires an uncommon degree of acuity in the evaluation of demeanor evidence, which the Board is not bound to assume the examiner has, to pick a single thread of truth from a web of falsehood. Furthermore, the examiner had found, and the Board relied upon his recommendation, that both Politzer and Weintraub "were unreliable witnesses in many respects" (R. 14).[103] Thus the examiner "found [Politzer's] testimony in many respects to be vague and unreliable" (R. 27, n. 7, see also R. 32, 33), and in four separate instances of conflict between the testimony of Chairman and

[103] We do not disagree with the observation of the court below that "nothing is more common in all kinds of judicial decisions than to believe some and not all" (R. 164). But it is equally true that, "in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 659. Each approach has a rational basis in human experience, and whether one or the other is adopted in the evaluation of testimony in a given case depends on the circumstances which commend themselves to the fact-finder as more nearly in accord with the truth. Neither approach can ordinarily be regarded as irrational, and accordingly that adopted by the fact-finder must be left undisturbed.

Politzer, the examiner credited Chairman (R. 25; 26, n. 5; 29, 30). In like fashion the examiner discredited significant aspects of Weintraub's testimony (R. 29, 30).

Accordingly, it was rational for the Board to conclude that Politzer did not tell Weintraub that Chairman would resign, and therefore "that the record contains no credible explanation of Weintraub's failure to call for disciplinary action against Chairman, on account of their quarrel on December 30, until about a month after the event" (R. 14). This conclusion is affirmatively corroborated by the credited testimony of Zicarelli, the union shop steward, that the day after the quarrel Weintraub told him that "it is forgotten" (R. 14, n. 6; 63). It is further corroborated by the fact that during the conversation of January 11, when Politzer advised Chairman that Weintraub wanted to bring the matter up again, Politzer, according to Chairman's uncontradicted testimony, commented that Weintraub "is acting funny, and he [Politzer] does not understand" (R. 51). Politzer would hardly have found Weintraub's attitude on the 11th "funny" or difficult to understand if Weintraub from the beginning had insisted on Chairman's leaving, and Politzer had told him that Chairman would resign. Thus, as the Board found (R. 14), the examiner's conclusion that Politzer told Weintraub that Chairman would resign "is irreconcilable with the other re-

lated facts, and all the other evidence bearing on Politzer's behavior and attitude at that time."

In view of the absence of any other credible explanation, and the fact that the explanation offered by petitioner's witnesses was a fabrication, the Board was likewise reasonable in concluding that Weintraub's revival of the December 30 incident, which he had spontaneously agreed to "forget," and in which his role was none too creditable, was reasonably explained only by petitioner's "extreme animus" against Chairman because of his testimony, and by Weintraub's knowledge that Kende was seeking a pretext for discharging him.

C. *The Immateriality Of Whether Kende Alone Seized On Weintraub's Complaint As A Pretext Or Whether Weintraub Was Also Influenced By Kende's Desire To Discharge Chairman For His Testimony In Bringing The December 30 Incident To Kende's Attention.* The Board found that alternative means may have been resorted to in order to exploit Weintraub's complaint as a pretext to accomplish Chairman's discriminatory discharge. That is, Kende alone may have been awaiting an opportunity to be rid of Chairman, and the Board emphasized this view by twice stressing it, once when it stated that "Chairman incurred the hostility of the [petitioner], and especially of Chief Engineer Kende, who ultimately discharged him" (R. 12), and later when

it stated that "Chairman was actually discharged —by Kende himself" (R. 13). Alternatively, Weintraub may have been influenced in bringing the matter to Kende's attention by his knowledge that Kende sought to utilize some plausible incident as a basis for Chairman's dismissal, and that, in this sense, it was because of Chairman's testimony that "Weintraub and Kende brought about Chairman's discharge" (R. 15). The Board stressed the immateriality of any specific plan shared by Weintraub and Kende, no less than the immateriality of whether Weintraub was discriminatorily motivated, for it stated that "neither in this, nor in any similar case, is it necessary that we have positive proof blue-printing the *method* whereby that discrimination was planned and accomplished" (R. 14, n. 7).[104]

Accordingly, rational support for either alternative requires affirmance of the Board's finding that Chairman was discriminatorily discharged. We have already shown at length that it was reasonable to conclude that Kende, acting from discriminatory motivation, whether or not shared by Weintraub, ordered Chairman's dismissal. It is also reasonable to conclude that Weintraub was influenced by Kende's discriminatory motivation

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[104] It was the examiner's insistence upon just such "blueprinting," as disclosed by the character of his findings, that prompted the Board to observe that "in weighing the evidence" the examiner "was guided by" too "rigorous" a "standard" (R. 12, n. 2, see also, R. 13, n. 4).

and that he acted in accord with Kende's plan to utilize some incident to effect a discriminatory discharge in reviving the December 30 incident.

The court below read the Board's findings (R. 14, n. 7), as holding that in reviving the incident of December 30, Weintraub was acting pursuant to a specific agreement between Weintraub and Kende made after the December 30 incident, an agreement from which Politzer had been excluded, rather than pursuant to Kende's plan to discharge Chairman on a pretext, a plan which Kende had revealed to both Politzer and Weintraub at the conference on December 1. We do not so read the Board's findings. The Board refrained from overturning the examiner's finding that there was no "explicit understanding between Kende and Weintraub, subsequent to the conference on December 1, that Weintraub would either create the December 30 incident itself, or exploit that particular incident as the basis for Chairman's discharge." The Board pointed out that the specific conspiracy theory was one "which the Examiner suggests and finds unproved." The Board did not indicate that it adhered to the theory, or that, unlike the Examiner, it believed that theory to have been proved. It specifically stated that it was unnecessary to "have positive proof blueprinting the *method* whereby * * * discrimination was planned and accomplished (R. 15, n. 7). The only basis for assuming that the Board found

that there was an explicit agreement between Kende and Weintraub is the Board's use of the phrase "Weintraub and Kende brought about Chairman's discharge" (R. 15, n. 7). But this phrase merely describes the sequence of events leading to the discharge; it does not embody a conclusion that Weintraub and Kende were co-conspirators.

IV. The Board May Order the Reinstatement With Back Pay of a Supervisor Who, Prior to the Amendment of the National Labor Relations Act, Was Discriminatorily Discharged for Testifying in a Board Proceeding.

As we have seen, on November 30, 1943, at a Board representation hearing, Imre Chairman, a supervisory employee, testified in support of the position of a group of rank-and-file maintenance employees that it constituted a unit appropriate for collective bargaining. Because of his testimony, Chairman was discharged by petitioner on January 24, 1944, in violation of Section 8 (4) of the original NLRA, which forbade an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." To remedy this discriminatory discharge, the usual Board proceedings were undertaken and completed through the issuance of the intermediate report before the NLRA was amended, but the Board's order did

not issue until August 31, 1948, more than a year after the amendments became effective on August 22, 1947. Except that it was renumbered 8 (a) (4), the amendments made no change in Section 8 (4); the definition of the term "employee" contained in Section 2 (3) however was amended to exclude from its purview "any individual employed as a supervisor."

The Board did not pass upon the question whether this change permitted an employer in the future to discharge a supervisor for testifying in a proceeding before the Board;[105] but, relying upon the general saving statute which prevents the extinguishment of a liability incurred under a repealed statute unless the repealing act expressly provides for it,[106] the Board entered an order requiring petitioner to offer reinstatement to Chairman and to make him whole for any loss of pay he sustained during the period of his discriminatory discharge to the date reemployment

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[105] The court below expressly stated that this is "a question we assume, but do not decide" (R. 165). See *Inter-City Advertising Co.*, 89 NLRB No. 127, for a situation in which the discharge of a supervisor may continue to be an unfair labor practice, remediable by his reinstatement with back pay, because it was effectuated in order to interfere with the organizational freedom of rank-and-file employees. See also, Brief for the National Labor Relations Board In Opposition To Certiorari in *Vail Mfg. Co.* v. *National Labor Relations Board*, October Term, 1947, No. 794, pp. 8-12.

[106] 61 Stat. 635, 1 U. S. C. (Supp. III), § 109.

is proffered him (R. 16, 17-18).[107] Petitioner contests enforcement of this order "requiring reinstatement and back pay for a supervisor" on the ground that it "is contrary to the policy and intent of the Congress. . . ." Pet. for Cert., p. 18.[108]

Though the amendments may have relieved employers of the obligation to refrain from future discrimination against supervisory employees, it does not relieve them of liability for past infractions of duty. For, reinstatement with back pay is a "liability" preserved from extinguishment by the general saving statute, which in presently pertinent part reads as follows (61 Stat. 635, 1 U.S.C. (Supp. III), § 109):

> The repeal of any statute shall not have the effect to release or extinguish any penalty,

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[107] The obligation to pay back wages is tolled for the period during which the Trial Examiner's Intermediate Report was outstanding (R. 16, 18). See *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 198, n. 7.

[108] The petition for certiorari does not challenge the other provisions of the Board's order, which, apart from the posting of appropriate notices (R. 18), require petitioner to cease and desist from discharging or otherwise discriminating against any *employee* because he has filed charges or given testimony under the Act, or in any other manner interfering with employees in the exercise of that right (R. 16, 17). Such conduct remains an unfair labor practice under Section 8 (a) (4) of the amended Act. An order, therefore, which prohibits subjecting *employees as a statutory class* to such conduct has a valid basis for future operation without regard to whether *supervisory employees in particular* may be embraced within its protection. *Briggs Mfg. Co.*, 75 NLRB 569, 574.

> forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

The term "liability" embraces within its orbit every form of statutory responsibility. *United States* v. *Reisinger,* 128 U.S. 398; *Hertz* v. *Woodman,* 218 U.S. 205, 217-218. It is "a duty to another enforceable by sanctions." [109]

The employee had a right under the statute to be free to testify, and the employer was under a duty to refrain from discriminating against him for that reason. If the employer does not comply, he is under an obligation, enforceable by the Board, to reinstate with back pay. This enforceable remedial obligation, designed to protect the employee against loss of his job and wages, is certainly a "liability" within the meaning of the general savings statute.

Accordingly, as the court below and two other courts of appeals have held (R. 165), the amendment of the original NLRA "did not extinguish" the employer's liability "to make restitution" for the wrongful discharge of a supervisor, and that "comprised" his "restoration . . . to his position . . .

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[109] Judge Learned Hand concurring in *Krenger* v. *Pennsylvania R. Co.,* 174 F. 2d 556, 560 (C. A. 2).

and the payment of any loss he may have suffered meanwhile." Accord: *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131, 136-137 (C. A. 4); *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 575 (C. A. 6), certiorari denied, 335 U. S. 908. This result is but one particularization of the common invocation of the general saving statute to preserve other statutory obligations incurred under the original NLRA. *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 236-237 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Mylan-Sparta Co., Inc.*, 166 F. 2d 485, 488 (C. A. 6); *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5); *National Labor Relations Board* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506 (C. A. 5); *Marshall and Bruce Co.*, 75 NLRB 90.

In preserving the obligation to reinstate discriminatorily discharged supervisors with back pay, the general saving statute fulfills its manifest purpose which is to imbue with continuing vitality a liability incurred under a repealed statute. It was enacted to abrogate the common law rule that the repeal of a statute remitted the obligations incurred under it.[110] To that end, the general

[110] See *Hertz* v. *Woodman*, 218 U. S. 205, 216, for a statement of the common law rule. In *Eastman* v. *Clackamas Co.*, 32 Fed. 24, 33 (C. C. D. Oreg.), it is stated that the rule of remission by repeal "is an arbitrary one, and never had anything to commend it, except in the United States an undue sympathy

saving statute is to be "treated as if incorporated in and as a part of subsequent enactments," and it "must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect" to it. *Great Northern Ry. Co.* v. *United States,* 208 U. S. 452, 465. Neither by "express declaration or necessary implication" does "the law, as a whole," deny to supervisors reinstatement with back pay as redress for their wrongful discharge.

There is no "express declaration" remitting such obligations incurred under the original NLRA; on the contrary, Congress rejected a proposal by which they would have been released. Thus, a provision of Section 102 (c) of the bill which passed the House [111] provided that proceedings instituted under the original Act "shall not abate" if they "could have been maintained under the new Act." As the House Conference Report [112] stated, under that bill "proceedings under the old act were to continue under the amended act only if they could have been maintained if initiated

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for wrongdoers, and in England an early prejudice among common-law judges against 'statute-made law'."

[111] H. R. 3020, 80th Cong., 1st Sess., (April 17, 1947) in 1 Leg. Hist. of the Lab. Man. Rel. Act, 1947, 209 (1948). See also, H. Rep. No. 245, 80th Cong., 1st Sess., 45.

[112] H .Conf. Rep. No. 510, 80th Cong., 1st Sess., 61.

under the amended act. . . ." However, Congress eliminated that provision from the bill as enacted, thereby making it unmistakably clear that the power of the Board to redress harm done by conduct prohibited under the old Act was not conditioned upon such conduct still being illegal under the amendments.[113]

Nor is there any remission of incurred obligations towards supervisors by "plain implication." None is to be implied, as petitioner would have it, from the amendments' incorporation of special saving clauses in relation to other subjects. It is immaterial that Section 102 permits future performance of presently invalid union-security agreements for a limited period; that Section 103 likewise preserves Board certifications for a limited period; and that Section 302 (f) and (g) of Title III of the Labor Management Relations Act, 1947, defers the applicability of that section to existing contracts for a limited period and exempts certain welfare funds from its regulation. It is settled law that a special saving clause in the repealing act does not prevent the operation of the general saving statute "unless the special character of that clause by plain implication cuts down the scope and operation" of the general saving

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[113] See *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 237 and n. 6 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Clark*, 176 F. 2d 341, 343, n. 2 (C.A. 3).

statute. *Hertz* v. *Woodman*, 218 U. S. 205, 218.[114] Since in this case nothing in the terms or operation of the special saving clauses impairs the general saving statute, the latter's full utilization is uninhibited. Indeed, in requiring that no liability shall be remitted "unless the repealing Act shall *expressly* so provide," the general saving statute stands "as a sentinel on guard" against release implied from the casuistry of "rules of construction," the "niceties of grammatical" parsing, or deduction from clauses "put in" to clauses "not put in." *United States* v. *Chicago, St. P., M & O. Ry. Co.*, 151 F. 84, 93-94 (D. Minn.), affirmed, 162 Fed. 835 (C.A. 8), certiorari denied, 212 U. S. 579, cited with approval in *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452, 469.[115]

Contrary to petitioner's contention (Br. 48-53), no remission of liability to reinstate supervisors

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[114] It has been so held repeatedly. *United States* v. *Reisinger*, 128 U. S. 398, 402; *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452, 466-470; *United States* v. *Palletz*, 330 U. S. 812 (see the Government's Statement As To Jurisdiction, pp. 5-6); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 119 and n. 11; *United States* v. *Carter*, 171 F. 2d 530 (C. A. 5); *Bowen* v. *United States*, 171 F. 2d 533 (C. A. 5); *Ex parte Sichofsky*, 273 Fed. 694, 696 (S. D. Cal.).

[115] Moreover, when Congress wishes retroactively to eliminate a liability of the kind here involved, it knows how to do so unambiguously, for the same Congress which amended the NLRA enacted the Portal to Portal Act of 1947 (61 Stat. 84, 29 U. S. C. (Supp. III) 251), and that Act clearly and expressly cancelled statutory liability for overtime compensation for certain activity. See *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254 (C. A. 2), certiorari denied, 335 U. S. 887.

with back pay as redress for a past wrong may be implied from the present policy [116] of the amended NLRA which denies future statutory protection to supervisory employees who wish to organize and bargain collectively.[117] "Restitution to [a supervisor] may be accomplished by a single affirmative act, without the [employer's] incurring any continuing obligation with respect to the future organizational activity, if any, of . . . any . . .

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[116] For statements of present policy, see H. Rep. No. 245, 80th Cong., 1st Sess., 13-17; S. Rep. No. 105, 80th Cong., 1st Sess., 3-5; 93 Cong. Rec. 3423, 3836, 5014, 4136-4137, 3443, 6501, 4985, 3446.

[117] Because the regulation of future conduct must be governed by current law (*National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662 (C. A. 2); *National Labor Relations Board* v. *Clark*, 176 F. 2d 341, 343 (C. A. 3)), an order requiring an employer to observe for the future a relationship with his supervisory employees which the statute no longer requires is not enforceable. (*L. A. Young Spring & Wire Corp.* v. *National Labor Relations Board*, 163 F. 2d 905, 906-907 (C. A. D. C.), certiorari denied, 333 U. S. 837; *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 579-580 (C. A. 6), certiorari denied, 335 U. S. 908). This is in consonance with the general principle that behavior *in futuro* is determined by an intervening change of law, whether the matter is in the process of adjudication (*Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 201), or has gone to final action (*United States* v. *Swift & Co.*, 286 U. S. 106, 114-115; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421; Fed. R. Civ. Proc., 60 (b) (5)), see brief for the National Labor Relations Board in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 42, this Term, pp. 38-46.

supervisor. There is therefore no conflict between an order restoring [a supervisor] to his *status quo* and the rights of the [employer] under the Act as amended." *Republic Steel Corp.*, 77 NLRB 1107, 1111. To infer from the future immunity of an employer the release of a liability incurred in the past "is to take too narrow a view of the public policy involved" (*Eastern Coal Corp.* v. *National Labor Relations Board,* 176 F. 2d 131, 136-137 (C. A. 4)):

> It is said that because supervisory employees are no longer protected by the Act, there is no public policy which requires their reinstatement, even though their discharge constituted an unfair labor practfce at the time. We think that this is to take too narrow a view of the public policy involved. The supervisory employees were discharged for exercising rights which the statute at that time guaranteed them. Whatever changes may have been made in the Act, the public policy which it embodies certainly requires that relief be accorded for unfair labor practices and that employees wrongfully discharged through such practices be restored to their positions with reimbursement of the loss that they have sustained as a result thereof. The fact that the company may no longer be required to bargain with the supervisors union is no reason why the supervisors who have been wrongfully discharged should not be restored to their positions with reimbursement of their loss.

Indeed, since present policy must be determined by reading "the terms of the law, as a whole" (*supra*, p. 115), that is, the general saving statute read in conjunction with the repealing act, the reasons underlying the general saving statute are as pertinent to the determination of present policy as the reasons underlying the repeal. *Republic Steel Corp.*, 77 NLRB 1107, 1111-1112.[118] In precluding the extinguishment of liability, the policy of the general saving statute is to protect persons who act in reliance upon existing law and to prevent rewarding wrongdoers who fail to observe prevailing standards. To withhold relief from persons who rely on the law as it stands is to disappoint their fair expectation that they are secure in the action they take. In this case, when Chairman, the discharged supervisor, was warned that he should not testify lest he fall "in bad graces with the company," he replied: "the Wagner Act . . . is the law of the land. There is nothing that I would be afraid of if I proceed lawfully" (R. 43). That view of his protection was well-founded, for though division existed within the Board as to

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[118] Thus, even in relation to criminal punishment, when the repealing act specifies a lesser term of imprisonment for the offense, the general saving statute prevails to require the imposition of the harsher punishment exacted by the superseded law, notwithstanding the manifest change in the penal policy. *United States* v. *Kirby*, 176 F. 2d 101, 104 (C. A. 2); *Lovely* v. *United States*, 175 F. 2d 312, 316-318 (C. A. 4); *Hurwitz* v. *United States*, 53 F. 2d 552 (C. A. D. C.); *Maceo* v. *United States*, 46 F. 2d 788 (C. A. 5).

whether any unit of supervisors was appropriate for collective bargaining,[119] no doubt ever prevailed concerning their statutory immunity from employer discrimination,[120] and redress for discrimination had been extended in impressive numbers to supervisors throughout the administration of the original NLRA.[121] The policy of the gen-

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[119] *Packard Motor Car Company* v. *National Labor Relations Board*, 330 U. S. 485, 492-493.

[120] *Soss Mfg. Co.*, 56 NLRB 348; *Packard Motor Car Company* v. *National Labor Relations Board*, 330 U. S. 485, 492, n. 3.

[121] *Fruehauf Trailer Co.*, 1 NLRB 68, 76, enforced, 301 U. S. 49; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, enforcing 1 NLRB 201, 222-225; *National Labor Relations Board v. American Potash & Chemical Corp.*, 98 F. 2d 488, 493 (C. A. 9), certiorari denied, 306 U. S. 643, enforcing 3 NLRB 140, 158-159; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 870-871 (C. A. 2), certiorari denied, 304 U. S. 576, enforcing as modified, 2 NLRB 626, 678; *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465 (C. A. 9, enforcing 4 NLRB 498, 504-505; *Crossett Lumber Co.*, 8 NLRB 440, 466-467, 472-473; *National Labor Relations Board* v. *Luzuray, Inc.*, 123 F. 2d 106, 108-109 (C. A. 2), enforcing 16 NLRB 37, 42-45; *National Labor Relations Board* v. *Richter's Bakery*, 140 F. 2d 870 (C. A. 5), certiorari denied, 322 U. S. 754, enforcing 46 NLRB 447, 450, 474-479; *National Labor Relations Board* v. *Whiting-Mead Co.*, 148 F. 2d 817 (C. A. 9), enforcing 45 NLRB 987, 1015-1018; *Warfield Co.*, 6 NLRB 58, 61-64; *Atlantic Greyhound Corp.*, 7 NLRB 1189, 1196; *Horace G. Prettyman*, 12 NLRB 640, 655-656, order set aside on other grounds, 117 F. 2d 786 (C. A. 6); *Chambers Corporation*, 21 NLRB 808, 829-830; *Condenser Corp.*, 22 NLRB 347, 386-389, enforced, 128 F. 2d 67, 74-75 (C. A. 3); *Golden Turkey Mining Co.*, 34 NLRB 760, 776-779; *Soss Mfg. Co.*, 56 NLRB 348; *Hazel Atlas Glass Co.* v. *NLRB*, 127 F. 2d 109,

eral saving statute, by preventing the retroactive defeat of such incurred obligations, is a surety that there is indeed "nothing" to "be afraid of" in relying on law as it stands.

Furthermore, it guards against disparity of treatment, for though obligations may be incurred at the same time, processes to vindicate them march with unequal speed; and the failure to make restitution to Chairman because proceedings pertaining to him were uncompleted at the time of repeal, but giving redress to another supervisor because completed, is an inequity the saving statute averts.[122] Finally, by exacting restitution from a wrongdoer despite repeal, those subject to regulation have less incentive to wager with time and future legislation to escape compliance with existing law.[123] In this respect, the policy of the sav-

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117-118 (C. A. 4); *R. R. Donnelley & Sons Co.* v. *National Labor Relations Board*, 156 F. 2d 416, 420-421 (C. A. 7), certiorari denied, 329 U. S. 810; *American Steel Foundries* v. *National Labor Relations Board*, 158 F. 2d 896 (C. A. 7); *National Labor Relations Board* v. *Skinner & Kennedy S. Co.*, 113 F. 2d 667, 671 (C. A. 8); *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. 2d 903, 911 (C. A. 8); *National Labor Relations Board* v. *Wells, Inc.*, 162 F. 2d 457, 458-459 (C. A. 9).

[122] See *Hertz* v. *Woodman*, 218 U. S. 205, 220-221; *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269, 275 (S. D. N. Y.)

[123] In another context, the Board has found it necessary to reshape its back pay remedy so as to prevent recalcitrant employers from profiting by delay in granting reinstatement. *F. W. Woolworth Co.*, 90 NLRB No. 41, 26 LRRM 1185.

ing statute effectuates all law, present and repealed; it encourages statutory beneficiaries vigorously to assert their rights uninhibited by fear of withdrawn protection, and, in addition, it fosters prompt compliance with prevailing standards on the part of those subject to regulation by removing some of the profit in delay.

In sum, in "terms of the law, as a whole," no reason in policy exists for failing to reinstate a supervisor with back pay as redress for his discriminatory discharge.

The public character of the right redressed through reinstatement with back pay does not make the sanction imposed any less a "liability." A monetary award of back pay is designed to "restore to the employees in some measure what was taken from them because" of the employer's wrong and in this respect resembles "compensation for private injury." *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 543.[124] In effecting "a restoration of the situation," by requiring "compensation for the loss of wages" and "offers of employment to the victims of discrimination" (*Phelps Dodge Corp.* v. *Na-*

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[124] See also, *Social Security Board* v. *Nierotko,* 327 U. S. 358; *Agwilines, Inc.,* v. *National Labor Relations Board,* 87 F. 2d 146, 150-151 (C. A. 5); *National Labor Relations Board* v. *Killoren,* 122 F. 2d 609, 611-612 (C. A. 8), certiorari denied, 314 U. S. 696; *National Labor Relations Board* v. *Sunshine Mining Co.,* 125 F. 2d 757, 761 (C. A. 9).

tional Labor Relations Board, 313 U. S. 177, 194), the Board, "as a public agency acting in the public interest" (*Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 265), secures "the protection and compensation of employees" (*Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7, 10). But the public character of the right makes no difference as to the existence of a "liability." Notwithstanding the public character of the regulatory scheme under the price and rent control legislation, liabilities incurred prior to repeal were "not thereby washed out;" [125] the general saving statute served to sustain criminal prosecutions,[126] governmental suit to secure restoration of overcharges,[127] and treble-damage actions.[128] In like fashion, although each is invested with the public interest, the general saving statute preserves the liability to pay a tax (*Hertz* v. *Woodman,* 218 U.S. 205), and sustains a criminal prosecution for discrimination in the

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[125] *Fleming* v. *Mohawk Wrecking & Lumber Co.,* 331 U. S. 111, 119 and n. 11.

[126] *United States* v. *Palletz,* 330 U. S. 812; *Stillman* v. *United States,* 177 F. 2d 607, 619 (C. A. 9); *Bowen* v. *United States,* 171 F. 2d 533 (C. A. 5); *Rehberg* v. *United States,* 174 F. 2d 121 (C. A. 5).

[127] *United States* v. *Carter,* 171 F. 2d 530 (C. A. 5).

[128] *Peters* v. *Felber,* 66 Cal. App. 2d 1011, 1012-1013, 152 P. 2d 42. Treble-damage suits are a means of securing the enforcement of a statute in the "public interest" through private initiative. *Bruce's Juices, Inc.* v. *American Can Co.,* 330 U. S. 743, 751-752.

application of carrier rates (*Great Northern Railway Co.* v. *United States,* 208 U.S. 452). As to the first, the collection of taxes for the public treasury "is essentially a matter of public and not of individual concern." [129] As to the second, "It is the province of criminal law to secure social interests regarded directly as such, that is, dissociated from any immediate individual interests with which they might be identified." [130] Thus, the "liability" preserved by the general saving statute plainly embraces sanctions rooted in the public interest.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision below should be affirmed.

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[129] *Massachusetts* v. *Mellon,* 262 U. S. 447, 487.
[130] Pound, *Criminal Justice In America,* 10 (1930).

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